S. HRG. 98-182

# THE FEDERAL ANTI-TAMPERING ACT

## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

## S. 216

A BILL TO AMEND TITLE 18, UNITED STATES CODE, TO COMBAT, DETER, AND PUNISH INDIVIDUALS WHO ADULTERATE OR OTHERWISE TAMPER WITH FOOD, DRUG, COSMETIC, AND OTHER PRODUCTS WITH INTENT TO CAUSE PERSONAL INJURY, DEATH, OR OTHER HARM

MARCH 4, 1983

**Serial No. J-98-13**

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

19-002 O WASHINGTON : 1983

552460

COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, JR., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ROBERT DOLE, Kansas
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina
CHARLES E. GRASSLEY, Iowa
JEREMIAH DENTON, Alabama
ARLEN SPECTER, Pennsylvania

JOSEPH R. BIDEN, JR., Delaware
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DECONCINI, Arizona
PATRICK J. LEAHY, Vermont
MAX BAUCUS, Montana
HOWELL HEFLIN, Alabama

VINTON DEVANE LIDE, *Chief Counsel and Staff Director*
DEBORAH K. OWEN, *General Counsel*
SHIRLEY J. FANNING, *Chief Clerk*
MARK H. GITENSTEIN, *Minority Chief Counsel*

# CONTENTS

## STATEMENT OF MEMBERS


| | Page |
|---|---|
| Thurmond, Strom (chairman) | 1 |
| Heflin, Howell | 2 |
| Sawyer, Harold S., Representative | 3 |


## PROPOSED LEGISLATION


Text of S. 216—A bill to amend title 18, United States Code, to combat, deter, and punish individuals who adulterate or otherwise tamper with food, drug, cosmetic, and other products with intent to cause personal injury, death, or other harm ..... 3


## CHRONOLOGICAL LIST OF WITNESSES


Jensen, Hon. D. Lowell, Assistant Attorney General, U.S. Department of Justice, accompanied by Roger Pauley, director, Office of Legislation, Criminal Division; and Stephen M. Weglian, attorney, Criminal Division ..... 4

Kushner, Gary J., vice president and general counsel, American Meat Institute, Arlington, Va.; George R. Green, assistant general counsel, Food Marketing Institute, Washington, D.C.; and Stephen W. Grafman, of Kirkpatrick, Lockhart, Hill, Christopher & Phillips, representing the Grocery Manufacturers of America, Inc., Washington, D.C ..... 24


## ALPHABETICAL LISTING AND MATERIALS SUBMITTED


Grafman, Stephen W.:
- Testimony ..... 24
- Prepared statement ..... 26

Green, George R.: Testimony ..... 32

Jensen, D. Lowell:
- Testimony ..... 4
- Department of Justice draft bill ..... 10
  - Comparison between S. 216 and DOJ draft bill ..... 12
  - Comparison between H.R. 1337 and DOJ draft bill ..... 14

Kushner, Gary J.:
- Testimony ..... 33
- Prepared statement ..... 36
- "Lessons From a Hog Dog Maker's Ordeal," by Geoffrey Colvin, Fortune, March 7, 1983 ..... 42

Pauley, Roger: Testimony ..... 22


## APPENDIX

### Additional Statements


Consumer Federation of America ..... 52

The Proprietary Association ..... 53

Milk Industry Foundation—International Association of Ice Cream Manufacturers ..... 54

American Frozen Food Institute ..... 55

National Food Processors Association ..... 57

Food Marketing Institute ..... 76

National Grocers Association ..... 79

Johnson & Johnson ..... 82

National-American Wholesale Grocers' Association ..... 84

# THE FEDERAL ANTI-TAMPERING ACT

FRIDAY, MARCH 4, 1983

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The committee met at 10:05 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Staff present: Vinton DeVane Lide, chief counsel and staff director; Deborah K. Owen, general counsel; and Paul Summitt, special counsel.

## OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

This morning we will examine the appropriate Federal response to recent unconscionable incidents involving malicious tampering with consumer products.

We are all sadly aware of several horrible events which seriously undermined public confidence in the safety of consumer products, such as over-the-counter drugs. Certain persons, with what is clearly criminal intent, have tampered or threatened to tamper with these items by tainting them with highly poisonous or noxious substances.

In Chicago, several persons died after taking Tylenol capsules filled with cyanide. Manufacturers have been forced to order recalls at great expense and inconvenience to them, as well as to the consumer. The innocent public has become apprehensive about the safety of products found on grocery and drugstore shelves. "Copycats" have been encouraged by news reports of these incidents.

The full force of the law and the investigative resources of both the Federal and State governments must be brought to bear on this unjustifiable conduct and its devastating aftermath. Just as the Federal Government acts to protect the consumer from certain unscrupulous practices and dangerous products, so must it forcefully address these sorrowful incidents under the powers granted by the Commerce Clause of the Constitution. At the same time, of course, we must safeguard against any unnecessary Federal involvement in matters more appropriately left to the States.

With these goals in mind, on January 27, 1983, I introduced S. 216, the Federal Anti-Tampering Act, which is the focus of our hearing this morning. I am pleased to say that the bill has already been cosponsored by 51 of my colleagues on both sides of the aisle—a majority of the U.S. Senate. Included among the cosponsors are the distinguished ranking minority member of this com-

mittee, Senator Biden, and Senator Leahy, whose contributions in the last Congress proved invaluable.

S. 216 would create new offenses in title 18 of the United States Code and would impose strong penalties aimed at deterring this reprehensible criminal activity.

First, where there is an intent to kill or endanger any person or to damage a business reputation, it would be illegal to do any act which results in the adulteration of certain consumer items. The Act is also intended to discourage false threats relating to tampering incidents which, in terms of potential damage and panic, can be similar to hijacking threats. This bill would make it a Federal offense to convey false information concerning an alleged attempt to commit a tampering offense, with willful and malicious intent and with knowledge that the information is false.

The penalties for all of the offenses contained in the bill are graduated, based on the severity of the results. Federal jurisdiction is sufficient to deal with the tampering problem effectively, but is appropriately limited to certain cases involving or affecting interstate commerce.

As chairman of this committee, I am firmly resolved to send this crucial legislation to the President's desk as soon as it is humanly possible. I am most appreciative of the cooperation demonstrated by the new chairman of the Criminal Law Subcommittee, Senator Paul Laxalt, in this effort. I am also encouraged by the assurances I have received from Congressman Hughes, the chairman of the House Subcommittee on Crime, that he will move his bill with similar speed.

Prompt and decisive action must be taken by the Federal Government to curtail these heinous incidents of product tampering. The American consumer has a right to feel secure from injury and death gratuitously inflicted by cold-blooded criminals. The Federal Anti-Tampering Act is intended to be an appropriate exercise of Federal authority under the Constitution and will serve as an effective deterrent and protective measure. I welcome any suggestions our witnesses from the Justice Department and affected industries may have to insure that it is a narrow and carefully crafted piece of legislation.

At this point, before we begin with our first witness, I have prepared statements by Senator Heflin and Congressman Sawyer, plus the text of S. 216 to place in the record.

[The aforementioned follows:]

PREPARED STATEMENT OF HOWELL HEFLIN ANTI-TAMPERING HEARINGS

Today, the Judiciary Committee is considering the Federal Anti-Tampering Act which was introduced in response to the recent cold-blooded and reprehensible incidents of product tampering.

I commend Chairman Thurmond and the ranking minority member, Senator Biden for their prompt action and leadership in developing this vital legislation and in their overall crimefighting efforts.

This act will make it a federal felony to maliciously tamper with food, drugs, cosmetics, and other personal and household goods and will impose a stiff penalty of 20 years imprisonment, a $20,000 fine or both, or possible life imprisonment if personal injury or death results. This act also punishes false threats relating to tampering incidents.

It is time that the full force of the federal government be brought to bear on this contemptible conduct and the devastating aftermath of "copycat" incidents, under-

mined public confidence and fear, and the manufacturers' expense of recalling the products.

It is my hope that the Federal Anti-Tampering Act will act as both an effective deterrent and protective measure.

I would like to welcome our witnesses today and I look forward to your testimony.

---

PREPARED STATEMENT OF HON. HAROLD S. SAWYER ON ANTI-TAMPERING LEGISLATION

Mr. Chairman, Members of the Committee: Our nation needs legislation to protect innocent and unsuspecting consumers from the malicious, cold-blooded acts of individuals who tamper with products prior to consumer purchase. I am proud to have had the opportunity to introduce H.R. 1544, the companion bill to S. 216 as introduced by Senator Thurmond and many of his colleagues. The House Committee on the Judiciary Subcommittee on Crime has held one hearing on this serious issue. I believe this legislation will move swiftly through the House due to the recognition that the Federal Anti-Tampering Act is necessary to the protection of our constituents.

The individual or group of individuals who placed cyanide filled Tylenol capsules on store shelves with total disregard for human life caused several random deaths in the Chicago area. In the wake of this tragedy, manufacturers were forced to recall products at great expense, and "copy-cats" have been inspired to continue the tampering trend in a variety of gruesome ways. A new angle, the "false scare", has developed. For example, in my own state of Michigan, the Hygrade Food Company initiated a financially burdensome recall of thousands of hot dogs after it was falsely and maliciously claimed that razor blades and tacks had been inserted into the meat.

In the aftermath of the tampering scare, consumers now play "Russian roulette" with their own safety every time they purchase the very products necessary to their own well-being. This might be expected in a good horror movie, but it cannot be tolerated in American society.

The criminal act of tampering with consumer products dictates the swift and forceful involvement of the federal government. The Food and Drug Administration has reacted quickly to protect consumers by setting anti-tampering packaging standards. The Johnson and Johnson Company, itself a victim of the Tylenol tampering, has done a swift and outstanding job of packaging its Tylenol capsules in containers with three separate anti-tampering protections. This private sector compliance is only just beginning.

Nationwide investigation and the swift enforcement of strict federal penalties must also be used to deter the act of tampering. This is the purpose of the Federal Anti-Tampering Act, which creates a new offense in Title 18 of the United States Code. Under this proposal, it would be illegal to tamper or attempt to adulterate a broad range of consumer products affecting interstate commerce, with the intent to injure or kill any person or to damage a business reputation. This proposal also would make it illegal to disseminate false information concerning the tampering of a product with willful and malicious intent. The penalties for these offenses include a maximum prison sentence of 20 years and a fine of $100,000. Where personal injury or death results, a maximum penalty of life imprisonment is provided. This House version is identical to S. 216 in every respect, except that I have increased the fine ceilings from $20,000 to $100,000.

I commend this Committee for addressing the need for antitampering legislation in such a prompt manner, and I look forward to working with you as the House and Senate develop the Federal Anti-Tampering Act.

---

[S. 216, 98th Cong., 1st sess.]

A BILL To amend title 18, United States Code, to combat, deter, and punish individuals who adulterate or otherwise tamper with food, drug, cosmetic, and other products with intent to cause personal injury, death, or other harm

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Federal Anti-Tampering Act".

SEC. 2. Title 18, United States Code, is amended by adding the following new chapter:

"CHAPTER 56—ADULTERATION

**"§ 1211. Malicious injury by adulterating a product**

"(a) Whoever, with intent to injure, kill, or endanger the health or safety of any person, or with intent to cause damage or injury to the business reputation of an individual, partnership, corporation, association, or other business entity (1) does any act which results in a food, drug, device, or cosmetic being adulterated or attempts to do any such act or (2) tampers or attempts to tamper with any hazardous substance or any other article, product, or commodity of any kind or class which is produced or distributed for consumption by individuals or use by individuals for purposes of personal care or in the performance of services rendered within the household, if such act of adulteration or tampering occurs before the food, drug, device, cosmetic, hazardous substance or other article, product, or commodity is introduced or delivered for introduction into interstate commerce, while such item is in interstate commerce, while such item is held for sale (whether or not the first sale) after shipment in interstate commerce, or if such act of adulteration or tampering otherwise affects interstate commerce, shall be punished by imprisonment for not more than twenty years or fined not more than $20,000, or both, or, if personal injury or death results to another, by imprisonment for any term of years or for life.

"(b) Whoever, with willful and malicous intent, imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would constitute a violation of subsection (a) shall be punished—

"(i) if personal injury or death results to another, by imprisonment for any terms of years or for life;

"(ii) if such conduct causes any person to be in sustained fear for his or another person's safety, causes any government agency or authority to direct a sale prohibition against, or recall of, any food, drug, device, or cosmetic, or causes any individual, partnership, corporation, or association to implement such prohibition or recall in response to such conduct, or causes other serious disruption to the public, by imprisonment for not more than twenty years or by a fine of not more than $20,000, or both.

"(c) As used in subsection (a), 'food', 'drug', 'device', 'cosmetic', and 'adulterated' shall have the meanings ascribed to those terms in the Federal Food, Drug, and Cosmetic Act, as amended (21 U.S.C. 301-392); 'hazardous substance' shall have the meaning ascribed to that term in the Federal Hazardous Substances Act (15 U.S.C. 1261(f)).".

SEC. 3. If any provision of this Act is held invalid, all valid provisions that are severable shall remain in effect. If a provision of this Act is held invalid in one or more of its applications, the provisions shall remain in effect in all of its valid applications that are severable.

SEC. 4. The analysis of part I of title 18, United States Code, is amended by adding the following:

"56. Adulteration ..... 1211".

The CHAIRMAN. Our first witness today is Hon. D. Lowell Jensen, Assistant Attorney General, Criminal Division, Department of Justice.

Mr. Jensen, come around. Have a seat, Mr. Jensen.

If you wish to introduce the gentlemen with you, please feel free to do so.

**STATEMENT OF HON. D. LOWELL JENSEN, ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE; ACCOMPANIED BY ROGER PAULEY, DIRECTOR, OFFICE OF LEGISLATION, CRIMINAL DIVISION; AND STEPHEN M. WEGLIAN, ATTORNEY, CRIMINAL DIVISION**

Mr. JENSEN. I thank you very much, Senator Thurmond.

I appreciate the opportunity to be here. On my left is Roger Pauley from the Criminal Division, who is the head of the Office of Legislative Affairs there; and on my right—excuse me, I got them mixed up. This is Roger Pauley, and Steve Weglian is from the

Criminal Division and an expert in these areas of food and drug kind of related offenses.

So that we are here to provide whatever information we can from the Department of Justice, and I would like to take this opportunity to make this statement, Mr. Chairman.

The Department of Justice strongly supports enactment of legislation that would impose more stringent criminal sanctions against those persons who would tamper with such products with intent to kill, injure, or endanger another person. By that I am referring to those products which are defined as foods, drugs, devices, or cosmetics as such in title 21 of the United States Code. In our view, present Federal statutes do not adequately address this type of criminal activity, which often may have tragic consequences to both the users and the manufacturers of the affected products.

Commencing with the widely reported Tylenol tampering tragedies occurring in the Chicago area in September of last year, our country experienced a number of reported incidents of tampering in which poisons or other harmful or caustic substances have been added to pharmaceutical, cosmetic, and food products. While fortunately the number of such incidents has apparently diminished, the results of these criminal acts were profound and tragic. In the Tylenol incidents, seven persons died because cyanide had been added to this widely used nonprescription pain remedy. In several hundred subsequently reported incidents, sometimes referred to as copycat crimes, other persons have reportedly experienced injuries or illness as the result of their use of pharmaceutical and cosmetic products that had also been adulterated through the addition of poisons or caustic substances.

In addition to the terrifying risk of actual exposure to potentially life-threatening adulterants in the foods, drugs, devices, or cosmetics consumed or used by them, members of the public may experience added adverse effects attributable to incidents of tampering. Consumers may find some of these products upon which they rely temporarily unavailable due to recalls of the affected products, or permanently unavailable due to a withdrawal from the marketplace by the manufacturer. Consumer confidence in otherwise efficacious and safe products may be undermined by actual or imagined risks associated with such products.

In short, the health, nutrition, convenience, and comfort of the American public are put at risk as the result of the heinous and despicable acts of a food or drug tamperer.

As the result of tampering incidents, the manufacturers of the affected products may suffer enormous financial loss and severe damage to the reputations of their otherwise useful and necessary producers. For example, Johnson and Johnson's McNeil Laboratories, the manufacturer of Tylenol, has reportedly estimated the cost of warnings to the public after the Chicago poisonings and the costs of recall, testing, and destruction of capsules to have been $100 million.[1] Whether most manufacturers would be able to withstand the potentially destructive losses of a product-tampering incident is seriously questionable.

---

[1] FDC Reports Vol. 44, No. 46 at 8 (Nov. 15, 1982).

The potential for withdrawal of manufacturers from the marketplace, accompanied by the resulting decrease in competition in the pharmaceutical, food, device, and cosmetic industries, loss of jobs, and the narrowing of the range of product choices available to consumers could have dramatic adverse effects on the American economy and the standard of living.

Thus, food and drug tampering is an appropriate matter for national concern. Moreover, Federal investigation and prosecution of such criminal conduct is appropriate. A single act of tampering at any of a number of stages in the national distribution chain for most foods, drugs, devices, and cosmetics could lead to injury or illness among the citizens of a number of States. Local and State law enforcement authorities may be limited in their ability to conduct and coordinate the investigative and prosecution functions necessary to address this serious national concern.

In addition, the disruption of food, drug, device, or cosmetic supplies nationally as a result of even an intrastate tampering incident could have serious adverse effects on interstate commerce in such products. Accordingly, it is the view of the Department of Justice that a Federal response to this national problem is necessary to augment the presently available local and State resources.

It is further our view that present Federal law inadequately addresses the crime of food or drug tampering. The Federal Food, Drug and Cosmetic Act prohibits, among other things:

> The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, the adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce; the receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or profered delivery thereof for pay or otherwise; and the alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being adulterated or misbranded.

Other sections of the act determine whether the food, drug, device, or cosmetic is adulterated or misbranded.[1] Under the penalties section of the act, 21 U.S.C., section 333, the commission or causing of any of the prohibited acts enumerated in 21 U.S.C., section 331 is a misdemeanor, punishable by a maximum sentence of 1 year's imprisonment and a $1,000 fine unless the violation if committed after a prior conviction has become final, or is committed with intent to defraud or mislead, in which case it is punishable by a maximum sentence of 3 years' imprisonment and a $10,000 fine.

While the provisions of the Federal Food, Drug, and Cosmetic Act would be applicable to most reported acts of tampering, they do not adequately punish or deter the serious and vicious conduct of tampering with such products with intent to harm others. Accordingly, it is our view that additional legislation is necessary to address this most despicable criminal activity.

The Food and Drug Administration, the agency charged with administration of the Federal Food, Drug, and Cosmetic Act, has undertaken a regulatory initiative aimed at preventing tampering in-

---

[1] The general adulteration and misbranded provisions are the following: Foods, 21 U.S.C. §§ 342, 343; Drugs and Devices, 21 U.S.C. §§ 352, 353; Cosmetics, 21 U.S.C. §§ 361, 362.

cidents of the type recently reported. On November 5, 1982, the Food and Drug Administration published a final rule providing requirements for tamper-resistant packaging and certain labeling for certain over-the-counter human drug and cosmetic products. This laudable regulatory initiative, undertaken with industry support, is a major step toward preventing a recurrence of tampering incidents such as those experienced in connection with the Tylenol poisonings. This preventative initiative, however, does not guarantee that tampering incidents involving the covered products and others will not occur in the future. Accordingly, the Department of Justice believes that more stringent criminal penalties should be enacted to deter and punish food and drug tampering.

I have attached to my statement a draft version of the bill which in our judgment would redress the major gaps in existing law. Unlike some other bills which have been introduced, our proposal is confined to deal primarily with the situation created by the recent Tylenol and other drug-tampering incidents.

The draft bill, like S. 216, would amend title 16 of the United States Code by adding a new section 1365. It prohibits and prescribes stiff felony penalties for the adulteration of any food, drug, device, or cosmetic, or the misbranding of the labeling or container thereof, with the intent to kill, injure, or otherwise endanger the health or safety of any person. It also covers attempts, threats, and conspiracy as well as hoaxes.

The draft bill contains a penalty scheme which varies depending upon the harm done. It defines the required culpable state of mind for the intent as knowing or having reason to know the normal and usual consequences of the adulteration or misbranding. We regard this as an important feature of the legislation. Moreover, like H.R. 83, H.R. 778, and H.R. 1337 in the 98th Congress, the bill would cover only foods, drugs, devices, or cosmetics but not other types of products. Unlike S. 216, the draft bill reaches tampering with the labeling of food, drug, device, or cosmetic products inasmuch as the potential for human harm from such tampering is as great as from a tampering with the product itself.

This draft bill in our judgment focuses on the most crucial products; builds upon existing law; has significant penalties; covers misbranding as well as tampering; and is aimed at those persons intending to harm individuals.

While there are similarities between S. 216, as introduced by the chairman, and our draft bill, there are also some significant differences. Unlike S. 216 and some other bills, our proposal specifically grants concurrent investigative authority to appropriate employees of the Federal Drug Administration and the Department of Agriculture as well as the Federal Bureau of Investigation. This has the important practical result of permitting the appropriate Federal regulatory agency to participate with the Federal Bureau of Investigation in the investigation. In our judgment, the expertise of Federal Drug Administration investigators or the meat, egg, and poultry investigators of the Department of Agriculture could be crucial in the successful solution of many crimes of the type to be proscribed.

There are two other general areas relating to the tampering problem which have been addressed in S. 216 but which have not

been included in our draft bill. They are: First, tampering with intent to damage business reputation and second, tampering with other than food or drug products. As to the former, it is our belief that any intentional tampering which foreseeably will result in bodily injury should be prohibited regardless of the motive of the perpetrator. This would include tampering done with intent to kill or injure a person as well as tampering with intent to harm business reputation. On the other hand, penalizing tampering with intent to damage business reputation as a separate branch of prohibited conduct would reach instances in which no physical harm to a person was contemplated or could result, for example, putting a harmless purple dye in orange juice. While such conduct may harm business reputation, we do not believe it is on the same order of magnitude which merits the same severe punishment as conduct involving tampering that may injure or take human life; nor is a tampering that is without the possibility of physical harm to the consumer likely to result in as much of a harm to business reputation. To the extent that such tampering is an adulteration under current law, it is already prohibited. Moreover, we are not aware of any pattern of incidents of this kind which would be likely to require investigation by the Federal Government. Accordingly, we see no reason warranting coverage of intent to damage business reputation as a separate offense in new Federal tampering legislation. As to expanding this statute to other products besides food and drugs, we are apprehensive. To date, we have not experienced any significant tampering with such products. To expand coverage in the lack of a demonstrable need may raise a host of problems presently not within contemplation. Hence, we would urge more study of the need for any such expansion.

I have set forth as an attachment to my testimony a comparison of the differences between S. 216 and our draft bill. I have also attached to my statement, for the benefit of the committee a comparison between H.R. 1337 and our draft bill which we provided to the Subcommittee on Crime of the House Committee on the Judiciary during our testimony before that subcommittee on Wednesday of this week. H.R. 1337, it should be noted, is identical to the anti-tampering provision contained in sections 301–303 of H.R. 3963, the Violent Crime and Drug Improvements Act of 1982, which was passed by the House and Senate in the 97th Congress.

We would urge the committee to give our draft bill favorable consideration. We are confident that suitable accommodation can be reached among the various proposals before the Congress. As President Reagan said in his veto statement on H.R. 3963 of the last Congress, we "share the widespread public desire for new legislation on tampering and will work with the new Congress to produce an acceptable bill on that subject."

That completes my prepared remarks.

Mr. Chairman, I will be happy to answer questions.

### FOOD AND DRUG ACT OFFENSES

The CHAIRMAN. Thank you, Mr. Jensen.

I understand that some of the conduct covered by S. 216 is currently penalized under the Food and Drug Act.

Could you please describe the existing offenses and tell the committee whether they provide an adequate deterrent against this type of criminal activity?

Mr. JENSEN. Yes, Mr. Chairman.

In the testimony I outline some of that. That is presently covered by title 21. That is on page 4 of the submitted written testimony, and it goes through the specific kinds of proscribed kinds of conduct. I think that the point that was made is that that conduct is presently proscribed at misdemeanor levels.

Our bill and S. 216 would raise the levels of penalties where there is an intent to harm and we are taking the present misdemeanor level offenses in the Food and Drug Act and raising them to felony levels under the definitions in both S. 216 and in our proposed bill.

The CHAIRMAN. Without objection, we will put the attachments to your statement in the record.

Mr. JENSEN. I appreciate that, Mr. Chairman.

[The following was received for the record:]

Department of Justice Draft Bill

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this act may be cited as the "Federal Anti-Tampering Act of 1983."

SEC. 2. Chapter 65 of title 18 of the United States Code is amended by adding at the end thereof the following new section:

"§1365. Tampering with consumer products with intent to cause injury or death

"(a) Whoever alters, tampers with, or does any other act with respect to a food, drug, device, or cosmetic, or the labeling or container thereof, which is in, is intended to be in, or continues to affect, interstate or foreign commerce, with the intent to kill, injure, or otherwise endanger the health or safety of any person, if such act results in such food, drug, device, or cosmetic being adulterated or misbranded, or attempts, threatens, or conspires to do so, shall be imprisoned for not more than ten years or fined not more than $20,000, or both; and if serious bodily injury results, shall be imprisoned for not more than twenty years or fined not more than $50,000, or both; and if death results, shall be imprisoned for any term or years or for life or fined not more than $100,000, or both.

"(b)(1) Whoever imparts or conveys false information, knowing the information to be false, concerning an act or attempted act which, if true, would constitute a violation of subsection (a) shall be imprisoned for not more than one year or fined not more than $10,000, or both.

"(2) Whoever willfully and maliciously imparts or conveys false information, knowing the information to be false, concerning an act or attempted act which, if true, would constitute a violation of subsection (a) shall be imprisoned for not more than five years or fined not more than $25,000, or both.

"(c) Violations of this section may be investigated by the Federal Bureau of Investigation in addition to any other Federal

agency having investigative jurisdiction under title 21, United States Code, for such violation.

"(d) A person has the intent required for an offense under this section if the person knows or has reason to know that the normal and usual consequence of the actual, attempted, or threatened alteration, tampering or other act would be to kill, injure, or otherwise endanger the health or safety of any person.

"(e) As used in this section --

"(1) the term 'food' has the definition given such term in section 201(f) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(f)) and also includes 'meat food product' as such term is defined in section 2(j) of the Federal Meat Inspection Act (21 U.S.C. 601(j)), 'poultry' as such term is defined in section 4(d) of the Poultry Products Inspection Act (21 U.S.C. 453(e)), 'poultry product' as such term is defined in section 4(e) of the Poultry Products Inspection Act (21 U.S.C. 453(f)), 'egg product' as such term is defined in section 4(f), of the Egg Products Inspection Act (21 U.S.C. 1033(f)), and 'egg' as such term is defined in section 4(g) of the Egg Products Inspection Act (21 U.S.C. 1033(g));

"(2) the term 'drug' has the definition given such term in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1));

"(3) the term 'device' has the definition given such term in section 201(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(h));

"(4) the term 'cosmetic' has the definition given such term in section 201(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(i));

"(5) the term "labeling" has the definition given such term in section 201(m) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(m);

"(6) the terms "adulterated" and "misbranded" have the

definitions given such terms in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) the Federal Meat Inspection Act (21 U.S.C. 601 et seq.), the Poultry Products Inspection Act (21 U.S.C. 451 et seq.) and the Egg Products Inspection Act (21 U.S.C. 1031 et seq.); and

"(7) the term "serious bodily injury" means bodily injury to a person which involves--

"(A) a substantial risk of death;

"(B) extreme physical pain;

"(C) protracted and obvious disfigurement; or

"(D) protracted loss or impairment or the function of a bodily member, organ, or mental faculty."

SEC. 3. The table of sections at the beginning of chapter 65 of title 18 of the United States Code is amended by adding at the end the following new item:

"1365. Tampering with consumer products with intent to cause injury or death.".

---

Comparison between S.216 and DOJ draft bill

I. Placement in Code

S.216 would place the provision in a new Chapter 56 entitled "Adulteration" in Title 18, United States Code. DOJ draft bill would place it in Chapter 65 "Malicious Mischief" of Title 18, United States Code. Both versions incorporate the definitions of "food," "drug," "device," "cosmetic," and "adulterated" from the Federal Food, Drug, and Cosmetic Act in Title 21, United States Code. The DOJ draft also incorporates the definitions for "labeling," "misbranded," "meat food product," "poultry," "poultry product," "egg product," and "egg" from appropriate provisions in Title 21.

II. Products Covered

There are major differences. Both bills cover foods, drugs, devices, and cosmetics intended for human use or consumption. However, S.216 is much broader. It also covers "any hazardous substance or any other article, product, or commodity of any kind or class which is produced or distributed for consumption by individuals or used by individuals for purposes of personal care or in the performance of services rendered within the household." It would appear to cover almost all of the products in a grocery store.

III. Jurisdictional Scope

Both bills seem comparable in terms of interstate commerce but DOJ's draft bill also speaks of foreign commerce. They both start federal jurisdiction in the manufacturing stage and retain it through the retail process. After the completion of the retail process, there could still be federal jurisdiction under S.216 if the tampering "affects" interstate commerce and under the DOJ draft bill if the now tampered product "continues to affect interstate or foreign commerce." Hence, neither version would cover the poisoning of medicine in one's own home where the poisoned medicine is not placed back on a retail shelf or does not further impact upon interstate or foreign commerce. Both versions recognize that there are appropriate limitations to the exercise of federal jurisdiction and that some areas of criminal activity are more appropriately left to the sole jurisdiction of state and local authorities.

IV. Criminal Acts Covered

Both measures cover tampering with the product itself and attempts. But the DOJ draft bill also covers threats, conspiracy, and tampering with the label. Moreover, the DOJ version uses the concepts of "adulteration" and "misbranding" in Title 21, which are well understood among these types of products. Like S.216, the DOJ draft also covers hoaxes as such acts can cause considerable expense to the victim company and inconvenience to the consuming public. However, the DOJ draft provides for two types of hoaxes. The knowingly furnishing of false information is made a misdemeanor. The providing of such false information with willful and malicious intent is made a felony.

V. Criminal Intent

Both S.216 and the DOJ draft bill require an "intent to kill, injure, or otherwise endanger the health or safety of any person," and do not require an actual death or injury or attempt to cause the result beyond the prohibited tampering. However, S.216 also penalizes an "intent to cause damage or injury to the business reputation of an individual, partnership, corporation, association, or other business entity."

VI. Inferred Knowledge

The Justice Draft allows proof of the required intent if the perpetrator knew or had reason to know that the normal and usual consequence of his act would be to kill, injure or otherwise endanger the health or safety of any person. Hence, there would be no defense for a person who knowingly placed arsenic in a medicine (knowing that arsenic can kill) with the intent to extort money or ruin a competitor's product, but did not "intend" to kill anyone as he planned to reveal the location of the adulterated product before physical harm befell a customer. Such a defense should not be permitted inasmuch as the perpetrator has knowingly placed lives in jeopardy -- conduct sufficiently dangerous to warrant severe criminal sanction.

19-002 O—83——3

VII. Penalties

S.216 has a two-tier penalty for tampering. For any attempt or where no injury results, it provides for imprisonment of up to twenty years and/or a fine of up to $20,000. Where there is personal injury (not defined) or death, there is imprisonment for any term of years or for life. There is no fine. For hoaxes, which must be performed wilfully and with malicious intent, S.216 provides for imprisonment for any terms of years or life if there is personal injury or death and a fine of up to $20,000 and/or imprisonment of up to 20 years if the "conduct causes any person to be in sustained fear for his or another person's safety, causes any government agency or authority to direct a sale prohibition against, or recall of, a food, drug, device, or cosmetic, or causes any individual, partnership, corporation, or association to implement such prohibition or recall in response to such conduct, or causes serious disruption to the public." It would seem that a hoax which causes none of the above would not be penalized. Also, it is unclear how a hoax could result in personal injury or death.

The Justice draft bill would provide that any attempt, threat or conspiracy which does not result in any serious bodily injury to a person would be punished by a fine or imprisonment up to $20,000 and/or 10 years, if there was serious bodily injury up to $50,000 and/or 20 years; and if death resulted up to $100,000 and/or any term of years or for life. The Justice draft utilizes the same definition of "serious bodily injury" as contained in H.R. 1337. Moreover, like other statutes (e.g., 18 U.S.C. 34, 241), the DOJ draft distinguishes between death and any lesser personal injury for grading purposes. The penalties for hoaxes are the more lenient, and should be compared with 18 U.S.C. 35 relating to bomb hoaxes and 49 U.S.C. 1472(m) relating to certain aircraft offenses. See generally United States v. Irving, 509 F.2d 1325 (5th Cir.), cert. denied, 423 U.S. 931 (1975).

VIII. Investigative Responsibility

Both S.216 and the DOJ draft bill, by locating the offense in Title 18, would place primary investigative responsibility in the Federal Bureau of Investigation. The DOJ draft bill, however, recognizes that the relevant federal regulatory agencies have an interest and have an expertise which will be of assistance in the successful solution of these offenses.

---

Comparison between H.R. 1337 and DOJ draft bill

I. Placement in Code

H.R. 1337 and the DOJ draft bill both place the provision in Chapter 65 "Malicious Mischief" of Title 18, United States Code. Both provisions incorporate certain definitions from the Federal Food, Drug, and Cosmetic Act in Title 21, United States Code with the DOJ provision also incorporating the definitions for "labeling," "adulterated," and "misbranded."

II. Products Covered

There is no difference. Both bills cover foods, drugs, devices, and cosmetics intended for human use or consumption. (Neither version covers food for animals.)

III. Jurisdictional Scope

H.R. 1337 is broader as it covers such products which "at any time affects interstate and foreign commerce" (emphasis added). This would appear to cover such products during their entire duration. The DOJ draft bill commences federal jurisdiction at the same time as H.R. 1337 but the phrase "continues to affect . . . commerce" is designed to terminate federal jurisdiction once the retail process is completed. Hence, the DOJ draft would not cover the poisoning of medicine in one's own home where the poisoned medicine is not placed back on a retail shelf. The DOJ draft recognizes that there are appropriate limitations to the exercise of federal jurisdiction and we believe the example provided indicates an area which is more properly within the sole cognizance of state and local authorities.

IV. Criminal Acts Covered

Both measures cover tampering with the product itself and attempts. But the DOJ draft bill also covers threats, conspiracy, and tampering with the label. Moreover, the DOJ version uses the concepts of "adulteration" and "misbranding" in Title 21, which are well understood among these types of products. The DOJ draft also covers hoaxes as such acts can cause considerable expense to the victim company and inconvenience to the consuming public.

V. Criminal Intent

While both bills are similar in requiring an intent to cause death or bodily injury, H.R. 1337 also requires the actual result of such death or bodily injury or an attempt to cause such result. The DOJ draft bill requires an "intent to kill, injure, or otherwise endanger the health or safety of any person," and does not require an actual death or injury or attempt to cause the result beyond the prohibited tampering. In our view, a tempering committed with the proscribed intent is itself seriously culpable and amounts to an attempt. To require more is unwarranted and is likely to lead to difficulties of proof and confusion.

VI. Inferred Knowledge

The Justice Draft allows proof of the required intent if the perpetrator knew or had reason to know that the normal and usual consequence of his act would be to kill, injure or otherwise endanger the health or safety of any person. Hence, there would be no defense for a person who knowingly placed arsenic in a medicine (knowing that arsenic can kill) with the intent to extort money or ruin a competitor's product, but did not "intend" to kill anyone as he planned to reveal the location of the adulterated product before physical harm befell a customer. Such a defense should not be permitted inasmuch as the perpetrator has knowingly placed lives in jeopardy -- conduct sufficiently dangerous to warrant severe criminal sanction.

VII. Penalties

Both bills have three tiers of penalties for the actual, threatened or attempted tamperings. However, there are some differences. H.R. 1337 creates a separate lowest level (up to $20,000 and/or 5 years) for attempts. The most severe (up to $100,000 and/or any term of years or life) is in the case of serious bodily injury or death. The medium level (up to $100,000 and/or 20 years) is for any other case.

The Justice draft bill, however, would provide that any attempt, threat or conspiracy which does not result in any serious bodily injury to a person would be punished by a fine or imprisonment up to $20,000 and/or 10 years, respectively; if there was serious bodily injury up to $50,000 and/or 20 years; and if death resulted up to $100,000 and/or any term of years or for life. The Justice draft utilizes the same definition of "serious bodily injury" as contained in H.R. 1337. Hence, Justice's draft would punish threats and attempts more severely. Moreover, like other statutes (e.g., 18 U.S.C. 34, 241), the DOJ draft distinguishes between death and any lesser personal injury for grading purposes. The penalties for hoaxes are the most lenient, and should be compared with 18 U.S.C. 35 relating to bomb hoaxes and 49 U.S.C. 1472(m) relating to certain aircraft offenses. See generally United States v. Irving, 509 F.2d 1325 (5th Cir.), cert. denied, 423 U.S. 931 (1975).

VIII. Investigative Responsibility

Both H.R. 1337 and the DOJ draft bill, by locating the the offense in Title 18, would place primary investigative responsibility in the Federal Bureau of Investigation. The DOJ draft bill, however, recognizes that the relevant federal regulatory agencies have an interest and an expertise which will be of assistance in the successful solution of these offenses.

FEDERAL JURISDICTION

The CHAIRMAN. Now, Mr. Jensen, in crafting this legislation, we wish to safeguard against undue Federal intervention into matters that are more appropriately left to the States.

How can we best insure this?

Mr. JENSEN. Well, I think there are two basic ways in which to do that.

One is to concentrate on the chain of distribution that I mentioned in that the national threat and the interstate commerce threat is actually in that distribution chain. Let us say that a product was purchased by a consumer and taken home, and then that product was tampered with in the sense that poison was added to some kind of substance. The purpose of that was to kill or injure a family member, someone to whom it was given. That is a local crime, that is a local kind of assault and may be murder at a local level and could be adequately dealt with at the local level. By limiting the kinds of offenses of tampering that we are talking about to the distribution chain itself, I think we protect against overintrusiveness as to what is already covered by local crime.

The other is to protect against what may be called overbreadth. That is that we do not have a statute that reaches too far in terms of the definition of the product or its distribution chain. So there are two ways of doing this.

I think one is by carefully defining the statute to limit it to the distribution chain, and the other is to be careful about the kinds of events that warrant Federal intervention, and that is those events as we see it that are limited to the intent to harm others and intent to harm with the products that we have now found to be typically involved in this kind of offense.

The CHAIRMAN. Mr. Jensen, as I understand it, the FBI provided investigative assistance in the Chicago tampering crisis. In other cases, such as the Visine case in Virginia, the matter has been left to local authorities.

What guidelines has the Department used in deciding whether to provide Federal assistance?

Mr. JENSEN. In the Tylenol incident, there was a Federal offense, in title 21 as I have already pointed out. That is not within the jurisdictional responsibility of the FBI, and it is at a misdemeanor level.

Given the nature of the national threat and the very serious conduct that was involved in the Tylenol incident, given the fact that there was a direct request from the local authorities for assistance from the FBI, both at the State and local levels, the Attorney General has power in unique situations to directly order investigative presence of the FBI. That is what took place. It is an ad hoc decision, a very serious situation.

In the Visine—I do not think there was—as I recall it, there was no Federal crime involved to have threshold jurisdiction in that there was nothing to suggest that this was not adequately within the powers of the local people to respond to. So that the answer is under present law it would require extraordinary decisionmaking process, but we would make it a part of the regular authority and

jurisdiction of the FBI under the circumstances that our bill describes.

The CHAIRMAN. If legislation similar to S. 216 or the Department's proposal is enacted, what guidelines will the Department use to determine whether Federal involvement is appropriate in a particular case?

Mr. JENSEN. Well, the bill, I think, would in and of itself define an authority and a jurisdiction. If the bill were to be drafted in its present form, it would define a new level of Federal crime. It would not only raise the penalty structure that is now in title 21 but there would be new Federal crimes.

It would be necessary to fashion structural courses in some kind of response, but we would have to see specifically what that bill said.

The bill would in effect trigger what kinds of instructional responses or guidelines were necessary. As we pointed out, we think that that is a significant problem in the bill, and if you move outside of the presently existing structures in terms of definitions and coverage, you would be into an area of perhaps overbreadth.

### CONSPIRACIES

The CHAIRMAN. Unlike S. 216, the Department's proposal would penalize conspiracies to commit tampering offenses.

What is the effect of specifying the conspiracy offense in this manner?

Mr. JENSEN. Essentially it is related to the penalties that are available.

Under the generic Federal statute on conspiracies, in title 18, section 371, there is a 5-year limit to conspiracy. This would raise that penalty structure.

So by putting it specifically in the bill, you effect the potential penalties for such a conspiracy.

### COVERED PRODUCTS

The CHAIRMAN. In your statement, you express some concern about covering tampering with materials other than foods, drugs, devices, and cosmetics. As you know, S. 216 would cover other products "produced or distributed for consumption by individuals or use by individuals for purposes of personal care or in the performance of services rendered within the household." This language might include items like vacuum cleaners.

Now, if the additional products covered by S. 216 were limited to those "which are usually consumed or expended in the course of individual consumption or use," would the Department's concern be less? This would confine the coverage of the bill to items such as household cleaners, which are commonly found on a grocery store shelf and covered under the Fair Packaging Act.

Mr. JENSEN. Yes; it would have an impact in terms of our position. The definition is that, as I said before, we think the present definition in S. 216 carries with it a problem of overbreadth. If there was a narrowing of the scope of the extension of present law, that would be the kind of thing we would like to see.

There is another point that ought to be made, however. It is not only a question of the definition in making sure that you are being narrow in your definition in terms of the problems of vagueness or ambiguity in the criminal statute or in the overbreadth of the coverage of the criminal statute, but there is an underlying premise and that is that there is a Federal need.

One of the reasons we are here is because of the rather obvious Federal need in the Tylenol incident. We really do not know of situations that would indicate that if you go into areas where there is no intent to harm others, that there is a Federal need for a new statute.

MISBRANDING

The CHAIRMAN. Mr. Jensen, as I understand it, the Department's bill would cover tampering incidents which involve misbranding.

Could you describe the type of conduct that this is intended to cover?

Would this language cover nonmaterial changes in a label?

Mr. JENSEN. It would not cover nonmaterial changes in that the misbranding once again relates back to present law in title 21, and it requires materiality.

But the kinds of situation we are talking about are the potential of mislabeling what is a toxic or poisonous substance as otherwise, of giving it a benign label, we label it as olive oil when we are dealing with some poisonous substance. The problem there is that what we have done is introduced a poisonous toxic substance into the distribution chain. If that is done with intent to harm, then that would come within our bill.

STATE OF MIND

The CHAIRMAN. The Department's bill would include within the state of mind required in the tampering offense "knowing or having reason to know that the normal and usual consequence of the tampering act would be death or injury to any person."

What conduct would be covered by this language which would not be included under S. 216?

Is this a new state of mind in the Federal criminal law, or is it contained in other offenses?

Mr. JENSEN. No; it is not a new state of mind. It is the kind of state of mind that parallels the typical case where one may have a specific intent to carry out—if you put it into, say, the homicide situation as the generic crime, a person may have a specific intent to kill but you may have, in addition to that, a parallel kind of intent that we generally put under the rubric of implied malice. That is, you carry out conduct that may not have a specific intent to kill but which is willfully in disregard of danger and that we are now putting people into the situation where the frame of mind that goes along with this is the kind of thing that is already in the law in the concepts that go into applied malice.

So we are extending beyond cases of specific intent to harm, to cases where there would be a willful disregard.

INVESTIGATIVE AUTHORITY

The CHAIRMAN. The Department's bill would grant concurrent investigative authority to the Food and Drug Administration, the Department of Agriculture, and the FBI. That is correct, is it not?

Mr. JENSEN. That is correct.

The CHAIRMAN. If S. 216 were enacted, would not these agencies already have concurrent jurisdiction under the existing statutes that you described in your testimony?

Mr. JENSEN. They would in terms of their existing title 21 authority.

What we are simply saying is that if a new statute goes into title 18 and if the FBI has jurisdiction, it is helpful to define that there is a concurrent responsibility so that the FBI could then supplement its investigative responsibility with some of the regulatory expertise. This just makes it appropriate for them to participate in the new offense which would be within the FBI's juridiction.

The CHAIRMAN. In what types of cases would this involve the FDA and Agriculture Department that are not covered under S. 216? For instance, would they be empowered to investigate false threats?

Mr. JENSEN. They would only be empowered to investigate those offenses which are now in title 21. I think the major limitation, as I pointed out, is that that is just at a misdemeanor level and it is related to the specific definitions. It would not cover the hoax situation which we now know is a serious problem in these tampering kinds of cases.

I think S. 216 and our bill would reach beyond present law and get us to an ability to deal with the hoax.

Our bill would limit the hoax situation where there was an underlined attempt to have personal injury.

The CHAIRMAN. On a practical level, what guidelines would the various agencies use to determine which investigates a given offense and to facilitate cooperation?

Mr. JENSEN. They would go through the usual kinds of agreements, I am sure, as to sharing of resource commitments and sharing of responsibilities.

What this bill is intended to do is to reach what we now see as the crimes of very severe levels, as national threats, and that is what we are getting to in terms of getting the FBI involved. I think that would speak for itself, the kinds of circumstances that we hope they will come up with. In those kinds of situations, there would be direct involvement of the FBI and the supporting involvement of the other agencies I have already alluded to. I do not think there would be any difficulty in working out arrangements should there be any marginal overlap in other kinds of offenses.

DAMAGE TO BUSINESS

The CHAIRMAN. Unlike S. 216, the Department's bill does not cover tampering with an intent to cause damage to a business reputation.

Would this exclude some conduct that could have a substantial adverse economic impact on the manufacturer and its employees?

Mr. JENSEN. On a theoretical level it may. I think I have already mentioned that the proposed bill of the Department of Justice would not reach that far, and there are two reasons for that.

One is the problem of statutory overbreadth. The other is simply a lack of any experience to suggest that there are such cases.

The cases we have experienced now have within them an intent to harm individuals in that what we have seen is that that is the real threat. It may be theoretically possible to conjure up situations which, by extending say the hoax statute and the definition to intent to harm business reputations might, even without any kind of underlying personal injury as a threat, be serious. However, we have no experience with that and we really do not think that there is any need to move into a new Federal criminal jurisdiction without any such experience.

The CHAIRMAN. Would the Department especially object if the bill would come out with tampering, with intent to cause damage to a business reputation?

Mr. JENSEN. As I said, it is our position that there is not a need that is shown for such a bill. It would cause some difficulty in terms of the problems of vagueness and overbreadth in that we would think that a better crafted bill would be the one that we would suggest.

The CHAIRMAN. Mr. Jensen, in your testimony, you note that such conduct would already be covered under existing misdemeanor offenses in the Food and Drug Act. However, the Department acknowledges in its prepared testimony that these offenses are inadequate to deter serious conduct.

Particularly in cases involving massive recalls of products, should we not give serious consideration to increasing the penalties where the intent is to cause economic damage to a business?

Mr. JENSEN. As we indicated, our perception of the problem is covered by the bill as suggested by the Department, and that is that the serious offenses are those where there is intent to harm associated with the tampering, and that that intent to personal harm is what gives it its severity.

As I say, we have not seen situations where, although theoretically possible, the same level of severity is involved if there is no personal threat or personal injury involved.

As far as the recall situation, it is a serious problem, there is no question about that. But you really cannot use the act of recall as part of your criminal definition. You would not be able to construct the statute where there was a felony jurisdiction, let us say, predicated upon whether or not a recall took place which is essentially an independent act. So that although you can recognize the economic kind of results from recall, you really cannot use the recall situation as one which is available for defining a criminal act.

The CHAIRMAN. Thank you, Mr. Jensen.

Mr. JENSEN. Thank you, Mr. Chairman.

### QUESTIONS SUBMITTED BY SENATOR PATRICK J. LEAHY

The CHAIRMAN. Senator Leahy was unable to be with us this morning. He has asked me to ask several questions on his behalf. We

will also hold the record open for any statement he would like to submit. These are his questions.

Mr. Jensen, I am pleased that the Department of Justice has submitted a tampering bill. It is a very thoughtful piece of work. I do have one or two questions.

As I understand it, your false information or hoax section distinguishes between knowing false statements and willful and malicious false statements. Our bill, S. 216, distinguishes between maliciously conveyed false information that, on the one hand, causes death or injury and, on the other, causes property destruction through a recall. False information that no one believes and therefore results in no harm is not included in S. 216.

It technically would be covered in your bill, providing the defendant knew it was false. I do not think prosecutors are going to waste their time with trivial prosecutions. Where expression is involved, I believe we should legislate with caution.

Why were the "triggers"—the harm resulting from the false information—omitted from your bill?

Mr. JENSEN. The difference in the bills, as Senator Leahy has pointed out, is that in S. 216 there would be no penalty for false information unless it was also conveyed or with a willful and malicious kind of frame of mind.

Our bill does that and has a penalty structure that is similar to S. 216, but our bill provides a hoax penalty at a lesser frame of mind without the balance. That is actually paralleled in existing law in the kinds of things you see in aircraft or bomb hoaxes, the same kind of penalty structure is used in our bill.

Essentially, what you are trying to do is to have a penalty structure which realizes there may be the kinds of conduct that is parallel to the bomb hoaxes which are essentially pranks. That is a level that ought to be prohibited, and our bill prohibits that but at a lower level of penalty.

S. 216 and our bill would also penalize at higher level those very serious kinds of false information hoaxes that would rise to the level of severity that we have seen associated with product tampering. So our bill provides for a little better coverage at a lesser level of punishment as parallel to the kinds of things that happened in the bomb hoaxes.

Mr. PAULEY. If I can just supplement that, Mr. Chairman.

I do not think it is fair to say that there is no harm under the hoax provision that we advocate. It is a different kind of harm; that is any kind of hoax is harmful in that it will cause the expenditure of resources by law enforcement authorities to investigate the hoax and to determine that it is in fact a hoax. That is a different kind of harm from harm to the manufacturer, for example, in terms of inducing him to undertake a recall of his product, but it is a substantial harm in that it misallocates scarce law enforcement resources. It is for that reason that bomb hoaxes and aircraft hijacking hoaxes are covered in the same way.

The CHAIRMAN. Is it mostly a question of penalty?

Mr. JENSEN. Yes, it is.

We would both penalize the severe kind of conducts with severe penalties.

The CHAIRMAN. You would penalize stronger than S. 216?

Mr. JENSEN. That is correct. Our bill would also penalize lesser kinds of hoax conduct with a misdemeanor or lower level penalty. It is just a question of reaching further into the kinds of hoaxes that we anticipate might occur.

The CHAIRMAN. This is another question submitted by Senator Leahy.

Mr. Jensen, you said that penalizing tampering with intent to damage business reputation as a separate branch of prohibited conduct will reach instances in which no physical harm to a person was contemplated or could result, and you give as an example putting a harmless purple dye in orange juice.

Suppose there is no way to tell—and I think this is close to a real world supposition—that the dye is harmless and the perpetrator says nothing? Is it not true that tremendous loss of property could occur in this situation and that neither your tampering nor false information sections would address the offense?

Mr. JENSEN. No; I think that what Senator Leahy says may be correct in the end-result sense. But if what he is saying is that it may be that the use of the harmless dye will reach into the threat to personal injury or will reach to the levels of personal harm, and that if we can ultimately establish that, either a level of hoax or a level of actuality, our bill will cover it.

I think what he is saying is that if you have a situation where the dye is introduced and it is clear that it is simply to harm business reputation, it is true our bill would not cover that. If it is not true, then our bill would cover it.

So if it does reach a factual situation where there is an intent to harm or that threat, then our bill would cover it.

The CHAIRMAN. Mr. Jensen, we want to express our appreciation to you and your associates who came with you to testify on this bill. We think it is a very important bill and we are pleased that you all feel that there is great merit in it too. We will try to act on this bill very quickly since it does require prompt treatment.

We thank you very much for your presence here this morning.

Mr. JENSEN. Thank you, Mr. Chairman.

The CHAIRMAN. Our next panel of witnesses includes three people—Gary J. Kushner, Esq., vice president and general counsel, American Meat Institute; George Green, assistant general counsel, Food Marketing Institute; and Stephen W. Grafman, Esq., representing the Grocery Manufacturers of America.

Gentlemen, we will place your full statements in the record.

If you could take about 5 minutes each to summarize your main thoughts, I would be very pleased. Then I would like to ask a few questions.

**STATEMENTS OF PANEL CONSISTING OF GARY J. KUSHNER, ESQ., VICE PRESIDENT AND GENERAL COUNSEL, AMERICAN MEAT INSTITUTE, ARLINGTON, VA.; GEORGE R. GREEN, ESQ., ASSISTANT GENERAL COUNSEL, FOOD MARKETING INSTITUTE, WASHINGTON, D.C.; AND STEPHEN W. GRAFMAN, ESQ., KIRKPATRICK, LOCKHART, HILL, CHRISTOPHER & PHILLIPS, REPRESENTING GROCERY MANUFACTURERS OF AMERICA, INC., WASHINGTON, D.C.**

Mr. GRAFMAN. Thank you, Mr. CHAIRMAN. I will try to make it in less than 5 minutes.

My name is Stephen Grafman. I am here today as special counsel for the Grocery Manufacturers of America, or GMA as it is commonly known—a trade association of manufacturers and processors of food and nonfood products sold in grocery stores throughout the country. GMA members employ more than 2.5 million people and have total annual sales in excess of $200 billion.

Mr. Chairman, the death of seven innocent people in the Chicago metropolitan area last summer has pointed up rather forcefully the glaring deficiency in the current Federal law—that is, the absence of statutory authority specifically designed to deal with this grotesque form of criminal conduct which has now emerged quite prominently throughout the country.

We commend this committee and the chairman in particular for the prompt attention given to this matter and urge the Congress to enact legislation that provides coverage against incidents of tampering encompassing the full panoply of consumer commodities manufactured for and sold in the grocery stores of our country.

To make tampering with some, but not all, consumer commodities an offense would be a serious mistake. A loophole of this nature allowing an individual to tamper with some consumer commodities with apparent impunity, in our view, is both shortsighted and indeed an invitation to disaster.

Federal criminal statutes currently in place are ill suited to address the deliberate acts of tampering and associated forms of antisocial conduct that have arisen since last September. As we have seen only too vividly an incident of tampering in Illinois can have far-reaching and immediate repercussion nationwide. Fear of tampering as respects all forms of consumer products has reached such epidemic proportions that this past fall numerous communities felt compelled to cancel their own Halloween activities.

Prosecution of individuals who tamper with consumer products should not be left solely to local law enforcement authorities. The Federal Government must share this responsibility. Local homicide statutes and other State criminal offenses should be supplemented by Federal legislation specifically designed to deal with this problem.

In addition, passage of such legislation can serve to clarify and solidify the authority of the FBI to investigate incidents of this nature, thereby assuring the availability on a nationwide basis of personnel trained in the detection of crimes and in the apprehension of criminals. Crimes of this nature, as we have seen, simply do not stop at State lines.

We urge the committee and the Congress as a whole to make sure that there are no loopholes in this much needed enactment so that the legislation enacted will truly serve its purpose; that is, the successful prosecution of all those who tamper with consumer products or otherwise engage in associated antisocial conduct.

Thank you.

[The following was received for the record.]

STATEMENT
OF
THE GROCERY MANUFACTURERS OF AMERICA, INC.
IN SUPPORT OF
PROPOSED CRIMINAL ANTI-TAMPERING LEGISLATION (S.216)

Good morning Mr. Chairman and Members of the Committee. My name is Stephen W. Grafman. I am an attorney engaged in the private practice of law with the Washington, D.C. law firm of Kirkpatrick, Lockhart, Hill, Christopher & Phillips. Prior to that time I served for five years as an Assistant United States Attorney for the District of Columbia, and during that period was involved in the prosecution of numerous federal and local criminal offenses brought under the United States and District of Columbia Codes respectively.

I am here today in my capacity as special counsel to the Grocery Manufacturers of America, Inc. ("GMA") -- a trade association of manufacturers and processors of food and nonfood products sold in grocery stores throughout the United States. GMA members employ more than 2.5 million people and have total annual sales in excess of $200 billion.

The Need for Legislation: A Void in the Law

We appreciate very much the opportunity to testify today on a matter of compelling importance: the need for prompt and effective legislation designed to deal with and combat a grotesque form of criminal conduct which has emerged in this country. As we are all only too keenly aware, less than six months ago seven innocent persons in the Chicago metropolitan area died from cyanide poisoning shortly after taking Extra-Strength Tylenol capsules. Indeed, but for the prompt action of alert authorities who quickly traced the seven deaths to the contaminated capsules in time to issue early warning to consumers, the death toll might well have been significantly higher.

The Incident and Its Aftermath

Although conclusive evidence as to the exact circumstances of the tampering does not currently exist, it is believed that one or more persons obtained the capsules, contaminated them with cyanide, reinserted the capsules into the bottles, returned them to the boxes in which they were to be sold, and then surreptitiously placed the boxes on the shelves in the stores from which the victims purchased them.

The deaths in the Chicago area, as we all know, received widespread attention. In short order the notoriety of this tragedy precipitated numerous "copycat" situations involving the contamination of a wide variety of consumer products. Indeed, numerous incidents have been reported since the Tylenol tragedy of individuals allegedly finding chemicals, poisons, needles, pins, and the like in a variety of consumer products. These reported incidents, among others, have encompassed oral hygiene products contaminated with hydrochloric acid in Clearwater, Florida, and with sulfuric acid in Oak Park, Illinois; a different pain reliever laced with rat poison, while other drug products were contaminated with acid in Grand Junction, Colorado, and with lighter fluid in Las Vegas; sodium hydroxide placed in a dairy product in Minneapolis; insecticides mixed with a beverage in Juno Beach, Florida; and pins, needles, and the like inserted into food products in New York, Connecticut, and Florida.

In the aftermath of the Tylenol tragedy, moreover, prank reports of product tampering have become a very real problem. For example, in Detroit some customers who complained of finding razor blades in hot dogs later admitted under questioning that their claims were fraudulent. However, before these hoaxes were confirmed, the company involved voluntarily initiated a costly recall of all its hot dogs from a five-state area in which the then-suspected contaminated products had been

distributed encompassing Pennsylvania, Ohio, Indiana, Illinois, and Michigan.

Indeed, this outbreak of tampering and the attendant threats, pranks, and associated conduct occurring in numerous states throughout the country has threatened to destroy public confidence in our nation's distribution system for food, drug, cosmetic, and other consumer products. Fear of tampering in fact reached such epidemic proportions that dozens of communities throughout the country this past fall felt compelled to ban or otherwise restrict Halloween activities in the interest of public safety.

Why a Federal Legislative Response

The totality of these incidents, we submit, demonstrates dramatically that the need for adequate product security is national in scope and of necessity requires a prompt response at the federal level. Unfortunately, as reports of tampering and associated occurences receive wide exposure, the probability of still further incidents increases. Accordingly, prompt action must be undertaken to help reduce the likelihood that such additional incidents will occur and that other innocent consumers will be harmed.

Most significantly, this rash of tampering and associated incidents of threats, hoaxes, and the like occurring across the country in the aftermath of the Tylenol deaths, represents a new form of criminal conduct for which, quite simply, existing laws are inadequate. Just as our society was forever changed when the first commercial aircraft hijackings occurred in the 1950s, so too have the 1980s now presented us with a new and arguably even more difficult challenge.

Given the magnitude of the Tylenol tragedy and the significant federal interest in deterring similar future incidents, prompt and decisive federal action is both appropriate and indeed essential to deter further tragedy.

The deliberate contamination of food, drug, and other consumer products -- no matter what the motivation -- is now a matter of paramount national concern. As we have seen, an incident of tampering in Illinois can have far-reaching and indeed immediate repercussions in virtually every state in the country. Prosecution of offenders under such circumstances should not be left solely to local law enforcement authorities. The federal government must share this responsibility!

Legislation Will Supplement, Not Preempt State Enforcement

In this regard, local homicide statutes and other state criminal offenses should be supplemented by federal legislation specifically designed to deal with this problem, providing penalties at the federal level commensurate with the seriousness of the threat posed to the national well-being and safety. In addition, passage of such legislation will serve to clarify and solidify the authority of the Federal Bureau of Investigation to investigate incidents of tampering, thereby assuring the availability on a nationwide basis of personnel trained in the detection of crimes and in the apprehension of criminals.

Federal criminal statutes currently in place are ill-suited to address the deliberate criminal acts of tampering and associated anti-social conduct now confronting us. For example, the Federal Food, Drug, and Cosmetic Act of 1938, as amended (21 U.S.C. §§301-392), provides a maximum punishment for adulteration of foods, drugs, devices, and cosmetics by a first offender of not more than one year's imprisonment and a fine of $1,000 (21 U.S.C. §333(a)); indeed, even the conviction of such an offender for a second offense, or for a violation committed "with the intent to defraud or mislead," carries a maximum penalty of not more than three years' imprisonment and a fine of $10,000, or both. (21 U.S.C. §333(b)).

In addition, there simply are no statutes at the federal level dealing with the individual who makes false assertions of tampering. Accordingly, this legislation is also needed to fill a void in existing law to assure that our judicial system is able to deal adequately and effectively with the purveyors of false information, as well as to the extent humanly possible, with all others who resort to such anti-social conduct regardless of their motivation.

Prompt Congressional action proscribing such conduct and authorizing meaningful criminal penalties will serve to assure the consuming public that the Congress is taking effective action to deter the heinous criminal activity that has arisen in the wake of the Tylenol deaths; this, in turn, will help restore consumer confidence in the integrity of all consumer products held for sale throughout the country. In addition, such action will serve to warn potential offenders of the severe consequences of such crimes. Indeed, the publicity given to this Congressional action, in and of itself, may deter additional incidents and help restore the high level of public confidence our nation's consumer products have heretofore enjoyed in the marketplace.

It is also appropriate to note -- and indeed we cannot emphasize too strongly -- that the proposed legislation would in no way supplant or otherwise preempt any state prosecutive authority. Nor would it deprive nor in any way disturb the authority now vested in other governmental agencies such as the Food and Drug Administration. Rather, the intent of the legislation is to supplement the various remedies currently available and fill a void in existing state and federal law.

We believe that S.216 will fill this gap in existing legislation and indeed will facilitate the successful prosecution of those who tamper with consumer products or otherwise engage in associated anti-social conduct.

Again, we note our sincere appreciation for the opportunity to appear here today. We commend this Committee for its prompt attention to this critical matter and urge the Congress as a whole to move swiftly to pass this much needed legislation.

SUMMARY OF STATEMENT

The death of seven innocent persons in the Chicago metropolitan area less than six months ago as a result of cyanide poisonings, occurring after these unsuspecting individuals had taken contaminated Extra-Strength Tylenol capsules, point up rather forcefully the glaring deficiency in current federal law: the absence of statutory authority designed to deal with this new and grotesque form of criminal conduct. Just as our society was forever changed when the first commercial aircraft hijackings occurred in the 1950s, so have the incidents of tampering of the 1980s presented us with a new and arguably even more difficult challenge.

Federal criminal statutes currently in effect are ill-suited to address the deliberate act of tampering and other associated forms of anti-social conduct that have arisen throughout the country in the wake of the Tylenol tragedy.

The deliberate contamination of foods, drugs, and other consumer products--no matter what the motivation--is now a matter of paramount national concern. As we have seen only too vividly, an incident of tampering in Illinois can have far-reaching and immediate repercussions nationwide.

Prosecution of such offenders under these circumstances should not be left solely to local law enforcement authorities. The federal government must share this responsibility. Local homicide statutes and other state criminal enactments should be supplemented by federal legislation specifically designed to deal with this problem, providing penalties at the federal level commensurate with the seriousness of the threat posed to the national well-being and safety.

In addition, passage of such legislation should serve to clarify and solidify the authority of the FBI to investigate incidents of tampering, thereby assuring the availability on a nationwide basis of personnel trained in the detection of crimes and in the apprehension of criminals.

We commend this Committee for its prompt attention to this critical matter of tampering, and urge the Congress as a whole to move swiftly in its consideration and passage of S.216.

###

The CHAIRMAN. Mr. Green, we would be glad to hear from you next.

Mr. GREEN. Thank you, Mr. Chairman.

I am George Green, assistant general counsel, Food Marketing Institute.

FMI appreciates the opportunity to present the views of food retailers and wholesalers on the need for Federal antitampering legislation. FMI's domestic member companies operate over 17,000 retail food stores with a combined annual sales volume of $125 billion—half of all grocery sales in the United States. More than three-fourths of FMI's membership is comprised of independent supermarket operators or small regional firms.

Mr. Chairman, FMI strongly supports your legislation, S. 216, making it a Federal felony to tamper with consumer products. We appreciate your leadership on this important issue. The American consumer has a high degree of confidence in the quality and safety of the products they buy in our Nation's supermarkets. The tampering situations threaten that trust and confidence in our food distribution system.

We believe that legislation is needed to supplement local criminal statutes and to provide a stringent deterrent against product tampering in order to protect customers and maintain faith in product safety. Any legislation that is enacted should include a number of essential provisions, and these are included in S. 216.

The legislation should cover tampering, or attempts to tamper, with not only food, drugs, devices, or cosmetics, but also with other consumer products sold by grocery stores as well. There are many products for use by consumers around the home, sold in a grocery store, which would not be covered under the definition of food, drug, device, or cosmetic. There is no good reason to exempt these products from any new legislation. To do so would leave the legislation incomplete and would also give potential criminals a safe haven from this proposed Federal jurisdiction.

Legislation should make illegal the willful or malicious conveyance of false claims that products have been subjected to tampering. Since the Chicago incident, there have been a number of hoaxes throughout the country. Unfortunately, there have also been many copycat situations which were not hoaxes.

False reports made in such circumstances could be clearly disruptive, could be dangerous to individual welfare, could seriously harm businesses, and should be made criminal. These claims and reports engender fear in the consumer and destroy public confidence. The result is that the consumer is held hostage to false claims.

This proposal regarding hoaxes finds counterparts in the Federal bomb hoax statute and in various State laws that make it a crime to give a false report that a criminal offense has been committed. We respectfully suggest that conveying false information is somewhat akin to crying "fire" in a crowded theater. The scramble and chaos caused by the false alarm can itself cause substantial injury. The second and more insidious effect of false claims is that they make it more difficult to determine when an actual tampering has taken place.

The Federal efforts to deter hijacking have come down hard on jokers and pranksters. Tampering with consumer products is no joking matter either and any false claims or hoaxes connected with tampering or would-be tampering should also be prohibited. We believe the legislation should make criminal actions taken with intent to cause injury to businesses, as well as those taken with intent to injure individuals. This is a very important provision. The damage to public confidence and public peace of mind is no less severe because the person committing the act did not intend to injure an individual. Acts committed with the intent to injure a business but having the potential to injure, kill, or endanger the health or safety of an individual should also be covered.

Finally, the legislation should provide stiff penalties for violations. We believe that the time is right for an antitampering bill. We also believe that Congress is prepared to pass a bill strong enough and far-reaching enough to do the job demanded. We think that S. 216 includes all the necessary provisions to do that job. We urge this committee to report the legislation to the floor of the Senate as expeditiously as possible.

Thank you, Mr. Chairman. I will be pleased to answer any questions that the committee may have.

The CHAIRMAN. Thank you.

We will now be glad to hear from you, Mr. Kushner.

Mr. KUSHNER. Thank you, Mr. Chairman.

The CHAIRMAN. By the way, Mr. Grafman, you are——

Mr. GRAFMAN. I am an attorney in private practice but I am here today in my capacity as counsel to the Grocery Manufacturers of America.

The CHAIRMAN. Mr. Green, you are with the Food Marketing Institute, and Mr. Kushner is with the American Meat Institute. Are these separate organizations?

Mr. GREEN. That is correct.

The CHAIRMAN. Are there some people who are members of two or more of these organizations?

Mr. KUSHNER. There is some overlap.

The CHAIRMAN. I am thinking of the Food Marketing Institute and Grocery Manufacturers.

Mr. GREEN. There is not much overlap between the Grocery Manufacturers and FMI.

The CHAIRMAN. What is the main difference in the clientele of those organizations?

Mr. GREEN. The Food Marketing Institute represents the food retailers and grocery store operators, the supermarkets. The Grocery Manufacturers represent the suppliers of the products that are on the shelves of the grocery stores.

Mr. KUSHNER. The American Meat Institute also represents companies that supply products for sale in grocery stores, but only red meat products. We are the packers and processors of red meat products.

The CHAIRMAN. All right, you may proceed now.

Mr. KUSHNER. My name is Gary Jay Kushner and I am vice president and general counsel of the American Meat Institute, a national trade association representing the meatpacking and processing industry.

We appreciate this committee's prompt attention to a problem of great concern to our industry. The Tylenol incident was only the beginning of the malicious tampering and related crimes with which the food and other household products industries and their customers have been plagued. The meat industry and our customers have been particularly victimized by false claims alleging product tampering that have grown to epidemic proportions in the last few months.

Mr. Chairman, when we speak of false claims, we really refer to two types of offenses. Probably the most prevalent kind of false claim situations is that where an individual purchases a product such as a hotdog and inserts into it a razor blade or a nail or other hazardous object, and complains either to the retail store where the product was purchased or to the manufacturer or to the local media in many cases that the product was bought in that adulterated condition. An equally serious situation is where an individual does not actually tamper with the product but merely claims, often by telephone calls to the manufacturer, retailer or local media, that a particular line of products has been poisoned or otherwise contaminated.

In neither situation can the wrongdoer be prosecuted under current Federal or State law. This void in the law makes it impossible to deter this kind of criminal conduct.

An incident that occurred almost immediately after the Tylenol episode involved a woman who alleged to the press that she had found a razor blade in her hotdog. The recall of 350,000 pounds of hotdogs and thorough reinspection of the product with special equipment installed for that purpose cost the company a minimum of $400,000 for that one incident. The company's sales plummeted for 2½ weeks to almost nothing, making the total cost of that one incident to that company an estimated $1 million. That company, by the way, only has annual profits of $8 million.

If the company had not been able to demonstrate so quickly that the woman had lied, that it was a hoax, the company would probably have had to close at least one plant putting more than 300 people out of work. The same company, by the way, received more than 20 such complaints in a 1-month period.

I have submitted for the hearing record a copy of an article from the March 7 edition of the Fortune magazine. This article describes in some detail that company's experience. I hope that the members of this subcommittee will have an opportunity to review that article because in a few short pages it puts this matter into perspective.

Another meat company recently elected to withhold from distribution nearly 4 million pounds of beef, pending the completion of tests on the product after they were alerted that the local media had received an anonymous telephone call from an individual claiming to have poisoned the meat. The ensuing investigation demonstrated that this company and its customers also were victimized by a hoax.

Mr. Chairman, both of these incidents threaten the consumer's confidence in the food supply. Both incidents also threaten the assets and business reputations of the two corporations involved. Yet current Federal and State laws are inadequate to address the

kinds of problems that we have described. The only Federal, State, or local laws that even touch this kind of problem are those making it a misdemeanor to file false police reports. None of these laws governs an individual who provides false information to a company, the media or even, for the most part, a Federal or State regulatory agency about a tampering or alleged product tampering incident. There simply is no remedy that is applicable to punish the criminal who perpetrates such a hoax or to deter this kind of unforgivable behavior.

There is an old and sacrosanct principle of constitutional law that says "where there is a right, there is a remedy." Consumers certainly have a right to purchase and enjoy food and other household products in confidence that these products are safe. Manufacturers and sellers of these products have a right to protection of their property and business reputations which they worked so hard to earn. This committee is to be commended for taking the leadership in looking for an adequate remedy to protect these rights.

We believe that S. 216 accomplishes this objective and we strongly endorse it.

Thank you for this opportunity to present our views today and we look forward to working with the committee as it further considers this proposed legislation in what we hope will be a very prompt fashion.

[The following was received for the record:]

STATEMENT

OF

AMERICAN MEAT INSTITUTE

Good morning. My name is Gary Jay Kushner and I am Vice President and General Counsel of the American Meat Institute. AMI is a national trade association representing the meat packing and processing industry. Our membership includes large and small companies, more than 70% of which employ fewer than 100 individuals. Our industry processes over 50 billion pounds of beef, pork, lamb and veal annually. Two thirds is fresh meat while one third is sold in the form of processed meats, hot dogs, salami and luncheon meat.

I do not believe that even one of us here today can conceive of the mind that contrived the Tylenol deaths. This malicious conduct threatens the safety of consumers as well as their peace of mind in purchasing food, drugs and other household products. The viability of companies selling products that have been the unlucky targets of tamperers is also threatened. Such criminal behavior should not go unpunished; these devastating actions should stir both state and federal resources. Every effort should be made to assure that this conduct is both deterred and curtailed.

The close of the Tylenol story has not been the end for the meat industry and other food industries. These industries have been a frequent victim of "copycat" crimes. The meat industry has been plagued with a rash of <u>false claims</u> alieging product tampering that have grown to epidemic proportions in the last few months.

These false claim offenses have taken two forms. Probably the most prevalent has been one where an individual purchases a meat

product such as a hot dog, inserts into it a nail or razor blade and complains either to the retail store where the product was purchased, to the manufacturer or to the local media that the product was bought in that adulterated condition. The less frequent, but equally serious situation, is where an individual does not tamper with the product, but merely claims, often by telephone calls to the manufacturer, retailer or local media, that a particular line of products has been poisoned or otherwise contaminated.

We know that, in some cases, these acts have been committed by individuals seeking "windfall" settlements of their "false claims." Other "false claims" have been traced to disgruntled former employees of the targeted companies seeking to damage the company's business or reputation. Some cases have amounted to out-and-out extortion. Whatever the reason for the act, the effects on the consumer and the companies making and selling the food products are the same. The consumer's peace of mind and security are threatened.

Since the wrong-doer cannot be prosecuted for false claims under present law, companies may be faced with a debt of hundreds of thousands of dollars for detaining or recalling enormous quantities of products from the market, destroying perishable products that have had to be withheld or withdrawn from the retail market, purchasing new detection equipment, rehandling, additional transportation costs, and special reinspection. Even more importantly - their hard earned reputation and consumer confidence in their products is placed in jeopardy.

To give you some idea of the magnitude of the harm that a false tampering claim can create, please allow me briefly to explore two particular incidents that have received some national publicity.

In the first case, an incident that occured almost immediately after the Tylenol episode, a woman alleged to the press that she had

found a razor blade in her hot dog. As as result of that complaint, the company, a highly regarded corporation, immediately recalled 350,000 pounds of hot dogs from the marketplace. The recall and thorough reinspection of the product with special equipment cost the company a minimum of $400,000. Moreover, the company's sales plummeted for two and a half weeks making the total cost of the of the incident over a million dollars for a company whose annual profits amount to only eight million dollars. If the company had not been able to demonstrate so quickly that it was a hoax, they would have probably had to close at least one plant -- putting 300 people out of work. The bittersweet ending to that story was that the woman who made the complaint failed a polygraph test and ultimately admitted that she had put the razor blade in the hot dog herself. The same company, by the way, received more than twenty such reports in a one month period. All of the reports on product tampering were proven to be false claims.

Another meat company recently elected to recall and withhold from distribution nearly four million pounds of beef pending the completion of tests on the products. The company had been alerted that the local media received an anonymous telephone call from an individual claiming to have contaminated the meat with harmful substances. Fortunately, prompt action on the part of the company and the responsible supervision of the U.S. Department of Agriculture made it possible for the product to be thoroughly tested to demonstrate that a disgruntled former employee perpetuated the hoax. Had the product already been shipped, it too would have had to be withdrawn from the market and much of it, because of its perishable characteristics, would have had to be destroyed.

Both of the incidents described here threatened the consumer's confidence in the food supply. Both incidents also injured, in an objectively measureable way, both the assests and business reputations of the two corporations involved.

The meat industry has worked hard and continues to do so to earn the confidence of consumers in the safety of the meat supply, a confidence that is our industry's most cherished asset. Therefore, AMI takes every opportunity to work with the federal government to ensure the consistent safety and wholesomeness of meat products to assure consumers that the meat supply is secure and that they can continue to purchase meat products with confidence.

Current federal and state laws are inadequate to address the type of problem that we have described. The only federal, state or local laws that even touch this kind of problem are those making it a misdemeanor to file false police reports. Those laws are only applicable where an individual files an official report containing false information with the police. None of these laws govern an individual who provides false information to a company, the media or, for the most part, even a federal or state regulatory agency about a tampering or alleged tampering incident.

On the other hand, the federal law and many state statutes include provisions making it a felony for any person to report falsely to any law enforcement official, employees of transportation companies, occupants of a building, or news reporters that a bomb has been placed in any private or public place. The Federal Anti-Hijacking Act is another federal law specifically proscribing the malicious conduct of a prankster in conveying false information about the events of an airplane hijacking. Obviously, the reason that such specific laws exist is because of the void in the federal and state laws to punish the malicious conveying of false information about an offense that threatens the public security.

It has been suggested that a company that has been victimized by a false claim always has available a civil cause of action -- "Why not just sue the prankster?" is the question that has been asked. A civil cause of action brought by a major corporation against an individ-

ual whose conduct may have cost the company hundreds of thousands of dollars has absolutely no deterrent value and, in fact, is really no remedy at all.

In effect, a company that has already suffered financially and in terms of its reputation is being asked to place its name once again in the public eye adding more publicity to the bad news about its products that has already been spread by the media. That same company is also being asked to join the long list of cases with which most civil dockets are already burdened just to wait years before obtaining a verdict against a judgment-proof individual. The fact that most people are aware of all these practical deficiencies in the civil remedy further negates any deterrent effect it might arguably have.

More fundamentally, the purpose of the civil courts is to resolve personal and property rights between people. The principal purpose of the criminal laws is to deter and punish offenses against society including, for example, burglary, arson and fraud. The societal costs associated with a false tampering claim leave no doubt that the appropriate remedy for this kind of conduct also rests in the criminal justice system.

There is an old and sacrosanct principle of constitutional law that "where there is a right, there is a remedy." Consumers certainly have a right to purchase and enjoy food and other household products with confidence that these products are safe. Manufacturers and sellers of these products have a right to the protection of their property and business reputation.

We fully endorse S.216 as a comprehensive and powerful vehicle to accomplish this objective. This Committee is to be commended for taking the leadership in looking for an adequate remedy to protect these rights.

We appreciate this opportunity to present our views today. We shall be pleased to provide the Subcommittee with any additional information that it might find useful as it further considers this matter.

* * * * *

SUMMARY OF THE STATEMENT

The American Meat Institute (AMI), a national trade association representing the meat packing and processing industry, urges Congress to prescribe federal penalties for acts of product tampering and the dissemination of false information regarding tampering or alleged tampering.

As shown in the recent Tylenol poisonings and related "hoax" episodes, an actual or alleged tampering incident threatens the public's confidence in consumer products. In addition, the damage to the assets and reputations of product manufacturers victimized by these crimes is often exorbitant.

A recent incident in the meat industry, in which a woman alleged to the press that she found a dangerous object in a hot dog, illustrates the need for prompt passage of this legislation. In that case, the woman's "false claim" resulted in a recall of 350,000 pounds of hot dogs at an estimated total cost to the company in excess of one million dollars. Company sales plummeted and only prompt realization that it was a "hoax" made it possible for the company to avoid long term damage to its reputation as well as plant closings that would have increased unemployment in an already economically depressed area.

In another case, a company withheld from sale and reinspected almost four million pounds of fresh meat because of a telephone call from a person who claimed to have poisoned it. That claim too was proven to be false, but only after more damage had been done.

Currently, there are no federal or state laws making such acts illegal. Passage of legislation to fill this void would be a major step towards punishing and deterring conduct that seriously threatens the public security.

[From Fortune, Mar. 7, 1983]

## Lessons From a Hot Dog Maker's Ordeal

(By Geoffrey Colvin)

Among the few reassuring thoughts to be found in the story of last fall's Tylenol poisonings is that the poisoner, if caught, can be sent to prison. But some the product-tampering incidents that followed—often called the Son of Tylenol cases—have revealed a gap in the law's safeguards. It turns out that people can defame, damage, and perhaps doom a company without breaking any laws. In certain confrontations with the malicious or the disturbed, companies are, to a scary extent, defenseless. So many companies have suffered from tampering scares that almost any maker of packaged foods or pharmaceuticals has reason to think about how to handle such a crisis if one strikes.

Tamperers have forced recalls of Dristan in New York and Anacin III in San Jose and of less widely known products, like Peggy Lawton Fudge Brownies in New England. Reports of tampering are up steeply at the Food and Drug Administration. Some reports, obviously spurious or isolated, aren't publicized. Those that are can saddle a manufacturer with the nerve-racking and expensive burden of protecting and restoring a brand's reputation.

No company has learned the bitter lesson of vulnerability more unforgettably than Hygrade Food Products Corp., a Southfield, Michigan, maker of processed meats. Hygrade's line includes boneless hams, knockwurst, and luncheon meats, but what the company lives on hot dogs. Of its $200 million in sales last year, hot dogs accounted for about $130 million, mostly from a single brand, Ball Park. Nationally Ball Park is No. 2, close behind General Foods' Oscar Mayer, but in Detroit it's No. 1 by a mile, holding about a third of the market—a greater share than any hot dog has in any other major city.

In late October, Hygrade's management began learning with horror that consumers in the Detroit area were reporting they had found frightening objects—mainly razor blades—in Ball Park franks. Executives assumed there must be a demented worker in the plant at Livonia, a Detroit suburb. While they searched for the criminal, they began recalling millions of franks.

Grim reports continued to come in. Hygrade President Clyde Riley, 56, recalls that the atmosphere at headquarters was "one of fear—support but fear." In a series of jobs, Riley has been building the Ball Park brand for 14 years, and now he saw it being destroyed. Employees, aware of his pain, spoke to him rarely and averted their eyes when he approached. Operations Vice President Charles Ledgerwood, 48, who was Hygrade's spokeman throughout the incident, "feared for the company's existence."

Within a few days, however, the mystery was solved. The reports were hoaxes. There was no demented worker. It is now virtually certain that all of the 14 people who reported finding a dangerous object in a Ball Park frank were lying, motivated by the expectation of a settlement from Hygrade or by some bizarre urge for notoriety. Several have confessed. Some agreed to take polygraph tests but then failed to show up. One simply disappeared.

What appalls many people out in Hygrade country is that only one perpertrator has suffered under the law. He served ten days for the misdemeanor of filing a false police report. Except for that offense there is currently nothing criminal about inserting a razor blade into a hot dog bought at a store, then calling the police and claiming the frank was packaged that way—and by calling news media directly, as some Hygrade tamperers did, a hoaxer avoids even the misdemeanor charge. Demanding money on the basis of a false claim constitutes extortion, but no one in the Hygrade case made any direct demands. The company could have sued the hoaxers and almost certainly would have won, but people who make such false claims are rarely well off. Suing would just have drawn out public memory of the incident.

Riley figures the brief affair cost Hygrade about $1 million—annual profits amount to only about $8 million—plus an incalculable amount in diverted management attention. On the whole, though, Hygrade came through a potentially disastrous situation about as well as anyone could hope to. Its experience could be a valuable guide to companies facing similar traumas.

Hygrade first heard about the claims on the last Wednesday in October, when a reporter for the *Detroit News* reached Ledgerwood, who was in Chicago on business. The reporter said that a Detroit housewife, Shirley Watson, had found half a razor blade in a Ball Park frank she had just taken from a sealed package. Could he comment? Ledgerwood guessed that the blade might have come from a machine in the

plant and promised he would "find out what happened and make sure it never happens again." He immediately flew back to Detroit.

The next morning Ledgerwood visited Mrs. Watson and examined the hot dog and blade—not a machine component at all, but half of a Gillette Blue Blade. Her husband, a Detroit policeman, joined them and remarked, according to Ledgerwood, that he shaved with that type of blade (he later denied it). Ledgerwood recalls that the remark seemed insignificant to him at the time.

Later that day, Ledgerwood and Riley made two decisions they now think were crucial to their successful handling of the affair. They decided to be open with the press, a course that seemed to offer the only chance of maintaining any public confidence. They also decided to funnel all information through a single spokesman, Ledgerwood, in order to avoid conflicting statements. Just as important as making these decisions, both men now point out, was making them quickly—which they did in a matter or moments while standing next to a secretary's desk. "There were no committee meetings on this damn thing," Riley notes with pride.

Also that day, Ledgerwood and Riley made the one main decision that company and police officials now agree was a mistake. They issued a press release acknowledging Mrs. Watson's "discovery" and blaming it on "deliberate sabotage by a misguided employee." That theory was not only wrong—it encouraged other consumers to make false claims about Ball Park franks.

Like the company, the press was credulous. An account of Mrs. Watson's story ran on page 13 of that morning's *News* under the headline "Razor blade found in hot dog." That alone "wouldn't have been too bad," Riley believes, "But once the TV people got onto it * * *" Hygrade quickly became the lead item on virtually every Detroit newscast.

Unsurprisingly, new tales quickly followed. That night a man reported cutting his lip when he bit into a hot dog with a razor blade in it. The next day, Friday, a woman reported finding a razor blade. Another man said he found a nail. Riley and Ledgerwood felt forced to stop production and recall all the franks made at Livonia that where still in stores—about 350,000 pounds of them.

These alarming new reports also provided clues that hoaxers had been at work. No two of the dangerous objects were exactly the same. Further, they were reportedly found in hot dogs packed on various dates spread over several weeks. Some, if inserted at the plant, should have begun to corrode—yet none had. Riley says that by Friday afternoon, two days after it all started, "We knew it was fraud."

But he and Ledgerwood, mistaken once, weren't quite ready to go public with their new conclusion. They wanted those recalled hot dogs inspected first. All weekend Hygrade plant workers, office workers, and even retirees toiled at the plant for free, inspecting thousands of 24-pack cases with borrowed metal detectors.

Saturday brought a dramatic break for Hygrade. After failing a polygraph test, the woman who on Friday had reported finding a razor blade admitted that her story was false. She said she had inserted the razor blade herself. Sunday afternoon, after 300,000 pounds of franks had passed quietly beneath the detectors, Ledgerwood announced the confession, the results of the inspection, and the suspicion that the reports of dangerous objects were hoaxes.

Partly from outrage, perhaps partly from chagrin that it had reported as facts so many things that turned out not to be facts, the Detroit press played the hoax story every bit as heavily as the original allegations. At least one newspaper and one television station editorially endorsed the product—a rare act in the journalistic world. Local retailers, delighted that their best seller had been vindicated, gave it extra promotion.

Ball Park's most enthusiastic booster was Livonia, home of the main plant. Mayor Edward McNamara and other officials decided the brand deserved some municipal bucking up, and the result was Livonia Loves Hygrade Week, staged about a month after the hoaxes were revealed. The attention was especially welcome because it drew nationwide press coverage, just as the damaging false reports had.

By the end of LLH Week, Ball Park's strength was fully restored. Sales in the Detroit area are now ahead of where they were before the episode. But Hygrade was extraordinarily lucky. Ball Park is a major brand with deep local loyalty. "If it hadn't been," contends Riley, "it probably would have been destroyed." Further, Hygrade was able to prove within a few days that the allegations were false. Other companies similarly victimized could very well be less fortunate.

They might wish for a law that would make such false reports illegal, and there just may be one soon. The Senate did pass a bill in the recent lame duck session—it would have made false reports of the type Hygrade suffered punishable by a $20,000 fine or 20 years in prison, or both—but the House Judiciary Committee decided the matter needed more study. The current prognosis by the American Meat Institute, a

strong pusher of the bill, is that it will likely be passed again by the Senate, but that the House remains a question mark.

Food manufacturers, in common with many other businesses, could not keep going for long without a base of trust. Hygrade, like Johnson & Johnson in its Tylenol ordeal, demonstrated the value of openness and consistency with the press when trust in a product is shaken. Since destructive acts of sociopaths, when directed against companies, cannot now be prevented or even deterred by threat of punishment, they can only be planned for and perhaps coped with. The lessons from Livonia may help.

### TAMPERING INCIDENTS

The CHAIRMAN. Thank you.

I have a few questions here. I will pose the question, and then one of you can answer. The others can comment, if you wish to do so.

As representatives of affected industries, you are in the best position to describe for this committee the experiences that your members have had with tampering incidents, and the damage that has resulted.

Without going into great detail about particular incidents, could you describe for the committee the magnitude of the problem, other than what you have already presented, the types of conduct you have encountered, and the damage that your members have suffered?

Mr. KUSHNER. Mr. Chairman, in the aftermath of the Tylenol episode, within a 1-month period, I personally learned of more than 12 different companies who had experienced false claims. They had received telephone calls from individuals—or from the media—alleging that they had found nails, razor blades or needles in hotdogs, or in other processed meat products. They had received claims that people had poisoned meat.

In the situation to which I referred where 4 million pounds of fresh meat were withheld from distribution, the individual claimed to have laced the product with cyanide, LSD, and arsenic. If that product had been put into distribution it would have had to have been recalled at a tremendous expense, several hundred thousand dollars, and probably would have had to be destroyed, because it is a highly perishable product, and could not be redistributed.

The example I gave in the other situation involving 350,000 pounds of hotdogs, the ensuing product recall was from five States. The cost was $400,000 just for out-of-pocket expenses related to the recall and inspection. When coupled with the loss of company profits, the total cost exceeded $1 million.

There is another cost associated with tampering and false tampering claims that cannot go unrecognized, and that involves the expenditure of resources by the Federal Government. The expenses incurred by USDA, FDA, and other agencies due to their necessary role can be extraordinary.

The chairman asked to what extent the Federal agencies have the authority to investigate tampering complaints, or false complaints. They do have the authority to investigate tampering claims or allegations that an adulterated food product or other product is on the market, and it is the responsibility of the U.S. Department

of Agriculture, for example, to insure that an adulterated meat product or poultry product is not being sold.

As soon as a complaint is made, or as soon as a tampering is identified, these agencies must go into force and ship chemists all over the country, engaging in costly testing, work with the companies in segregating and recalling products. I have been told by officials of the U.S. Department of Agriculture that the resources they spend are absolutely tremendous. When they finally finish their investigation, and if they find out that there has been a tampering, they can recommend prosecution for a minor misdemeanor to the Department of Justice. If they find out there has been no tampering and the incident is merely a hoax, they can do absolutely nothing.

The CHAIRMAN. Thank you.

Mr. Green, do you care to comment on that?

Mr. GREEN. Yes, Mr. Chairman.

Just let me add that in the aftermath of the Chicago incident, food retailers have received hundreds and hundreds of communications concerning tampering, and alleged tampering incidents. Each one of these involves a cost, the cost of removing, products from the shelves of the stores, labor costs associated with that, and of course market disruption.

And just as importantly these hundreds of incidents do have a substantial impact on consumer confidence in our food distribution system. So there has been a very, very significant impact since Chicago.

The CHAIRMAN. Thank you, Mr. Green.

Mr. Grafman?

Mr. GRAFMAN. I really cannot add more to that than to say that the biggest cost is in fact the cost to the consumer encompassing the general fear that grips the country every time there is one of these incidents. Everyone suffers and there are devastating consequences across the board.

### INTENT TO DAMAGE BUSINESS

The CHAIRMAN. As you are aware, unlike some other proposals, S. 216 covers tampering conduct in which the offender engages with an intent to cause damage to a business reputation.

Can you describe the damage that this type of conduct might cause?

Mr. GRAFMAN. One example was the one that Mr. Jensen used in his testimony—the situation, I think he said of the purple dye in the beverage product. It may be that this particular act would not do any harm to the health or the personal safety of the consumer who uses it; but the consumer does not know that at the time, and would not know it until the matter is investigated. There is no sense having a loophole in the law that someone can get through because he says look, I knew this was a harmless dye product, I knew it cannot hurt anybody, and I did it because I did not intend to harm anybody; therefore, Mr. Prosecutor, I am not guilty of anything under this statute, and if you charge me, I am going to walk out the back of the courtroom.

What we commend, in particular, to the committee in S. 216, is the fact that it has closed this loophole as to people who tamper regardless of their motivation. This conduct has the same devastating consequences; someone who hears there is dye in the beverage, is not going to drink it, and is going to wonder whether it is harmful.

Again, I think this is a perfect example of why we need S. 216; it will have its biggest impact on insuring that we do not allow people who cause this devastating antisocial conduct to walk out of the courtroom on the basis of a legal technicality.

The CHAIRMAN. Any other comments on that?

Mr. KUSHNER. Yes, Mr. Chairman.

Again, in that one situation that I described earlier, where the company recalled 350,000 pounds of hotdogs on one claim that a razor blade had been found, that company could not sell hotdogs for 2½ weeks. That particular company was the leading brand in its area before the incident, but for 2½ weeks it sold almost nothing.

If the incident had not been ended soon, the company would have had to close a plant, perhaps putting the brand out of business, that not only destroys the company's reputation, and the viability of any other products it might manufacture, but it destroys the company's assets, and it puts a lot of people out of work.

The CHAIRMAN. Now, the people would not buy from that company because of the rumor, or the company itself just closed down for 2½ weeks to restore confidence?

Mr. KUSHNER. The company did not close down. In fact, many of the company's employees came to work on weekends and worked without pay to try to aid the investigation, to help put products through metal detectors, because they had confidence in the company and in the product.

People would not buy the product pending the investigaton because they were scared. If it lasted much longer the company would not have been able to regain its market position, and would have had to close its doors.

### FOOD AND DRUG ACT OFFENSES

The CHAIRMAN. Thank you.

It has been suggested that this conduct is already covered under the Food and Drug Act. Are those offenses adequate to deter this conduct and prevent the damage that you have described?

Mr. KUSHNER. The only kind of offense that is covered by the Food, Drug and Cosmetic Act, or for that matter, the Federal Meat Inspection Act, the comparable form of legislation covering meat products, is the actual adulteration of a product, an offense for which there is a minor misdemeanor penalty. This section of the law would not be adequate to cover the offense of willfully tampering with a product and threatening the consumer safety in a form that we have identified.

In addition, there is no offense that we know of to punish the making of a false claim about a product tampering.

MISBRANDING

The CHAIRMAN. The Justice Department has proposed that the bill be expanded to cover offenses involving mislabeling.

Would you favor that change in S. 216?

Mr. GREEN. We would have no problem with that change, Mr. Chairman. We think it would add to the bill's merits.

Mr. GRAFMAN. I think that is a very constructive proposal that the Justice Department has made.

Mr. KUSHNER. I would agree with that.

COVERED PRODUCTS

The CHAIRMAN. The Justice Department has expressed some concern about the fact that S. 216 would cover tampering offenses involving products other than food, drug devices, and cosmetics.

Do you believe that legislation in this area should be restricted to food, drugs, and cosmetics?

Mr. GRAFMAN. Mr. Chairman, we feel very strongly that it should be much more expensive than food, drugs, and cosmetics. The same type of harm, the same concerns for the consuming public, and the same concerns for damage to business, confront us when a product other than a food, a drug or cosmetic is involved.

The fact that someone may tamper with a laundry detergent, for example——

The CHAIRMAN. A what?

Mr. GRAFMAN. A laundry detergent would not be a food, drug or cosmetic, but tampering with such a product could have the same devastating consequence.

There are a number of other examples one could look to, and what we applaud the committee for in the proposal set forth in S. 216 is that your legislation is broad enough to encompass all of these other consumer commodities, and that is what we want, across-the-board coverage of food, drug, and cosmetics are fine as far as they go; but in this day and age that we live in, what we would hope for is that the full panoply of consumer products enjoys the protection of the law.

The CHAIRMAN. Any other comments?

Do you all agree with him, or disagree?

Mr. GREEN. We absolutely agree.

The CHAIRMAN. Both of you?

Mr. KUSHNER. Yes, sir.

The CHAIRMAN. Would you favor an amendment to the bill which would restrict its coverage to items covered under the Fair Packaging Act, that is, those produced for individual use or consumption, which are usually consumed or expended in the course of consumption or use?

Mr. KUSHNER. I would not want the bill amended so as to be or restricted to those products, because as I recall, the definition of "consumer commodity" under the Fair Packaging and Labeling Act explicitly excludes meat and meat products, and several other products that are defined by the Food, Drug, and Cosmetic Act and other statutes.

However, I would favor an amendment to supplement the definitions of the other products listed to include those other products covered by the Fair Packaging and Labeling Act.

The CHAIRMAN. We could use this language in addition to the food and drug language.

Mr. KUSHNER. That is correct.

The CHAIRMAN. Any other comments?

Mr. GRAFMAN. I think that would be a useful amendment to add to S. 216. Again, I would emphasize that as it stands now, it does clearly cover food, drugs, and cosmetics, and these other consumer commodities, but the language that the chairman has referred to would perhaps be a useful addition to the statute.

Mr. GREEN. Mr. Chairman, we agree. That that language would have the meritorious effect of satisfying the problems that some people have with the scope of the bill as it is drafted now.

### INVESTIGATIVE AUTHORITY

The CHAIRMAN. The Justice Department has proposed that concurrent investigative jurisdiction over these offenses be granted to the Food and Drug Administration and the Department of Agriculture, in addition to the FBI.

What are your feelings about that proposal?

Mr. GRAFMAN. I think it——

The CHAIRMAN. S. 216, I believe, would confine it to the FBI. Is there any objection to extending it to the Department of Agriculture?

Mr. GRAFMAN. I do not think that there would be any objection. I think that these other agencies have the authority to the extent that it is set forth presently in title XXI. To the extent that the proposal of the Justice Department simply makes it clearer that these other agencies can share concurrent investigative authority with the FBI, would not create a problem.

The CHAIRMAN. Is there any objection to granting jurisdiction to the Food and Drug Administration and the Department of Agriculture, in addition to the FBI?

Mr. KUSHNER. No objection.

Mr. GREEN. No, sir.

### STATE OF MIND

The CHAIRMAN. S. 216 would punish a tampering offense where the offender has a specific intent to cause death or injury to another. The Justice Department has suggested that this state of mind should be defined to include situations where the offender knew, or had reason to know, that the normal consequences of his conduct would be death or injury.

In your view, would this change be an improvement in the bill?

Mr. KUSHNER. Mr. Chairman, I believe that would be constructive a supplement to the bill for the following reason. If somehow, the injury to business reputation provision in this bill were not carried through to final passage, and the bill were limited to offenses with the intent to injure a person only, that intent would have to be broadly defined. Otherwise, arguably, an individual could put a hazardous object in a product, tampering with it, and then defend-

ing himself by saying his intent was only to cause a recall, and not to cause injury to a person.

The CHAIRMAN. I would be glad to hear from the others.

Mr. GRAFMAN. I do not necessarily have a problem with the language of the Justice Department bill, however, I think that the specific intent offense as presently set forth in S. 216, is adequate for our purposes, and I am not sure that we need that extra definitional language.

I think it potentially could cause as many problems as it might be thought to solve.

### SAFE PACKAGING

The CHAIRMAN. It has been suggested that Federal legislation in the criminal law area might not be necessary because of the adoption of Federal safe-packaging requirements.

Do you believe that regulatory action is enough to deter the type of conduct that concerns us all?

Mr. GREEN. Mr. Chairman, we think that safe packaging requirements, not only are not enough, but they are totally inappropriate to the food area. We think that it would be a very difficult, indeed impossible, task for the Government to come up with packaging requirements to make food products tamper resistant. We think it much more appropriate and rationale response is to provide this stringent deterrent under the Federal criminal laws against product tampering.

Mr. GRAFMAN. I think it is a clear and resounding no. It is a matter of criminal conduct that we are dealing with, and the only way to deal with it is through criminal legislation. The regulatory approach simply is not going to solve this problem.

Mr. KUSHNER. I would agree. The question of punishing tampering is very different from that of packaging integrity. Packaging is useful to provide safety, and manufacturers already do a great deal within what is technically possible to insure the safety and the integrity of their products. There is little more that can be done with most food products, in this respect and it is important that we have a means by which to prevent people from trying to tamper with the products that are in the marketplace.

### CIVIL SUITS

The CHAIRMAN. Similarly, are civil suits by the manufacturer an adequate deterrent?

Mr. KUSHNER. They are not adequate deterrents for two reasons. First, in the situation of a hoax, or a false claim, I cannot imagine what specific tort in tort law would cover that kind of offense.

Second, by asking a manufacturer to file a civil lawsuit against an individual, you are asking that company, which has already expended a great deal of money, had its name in the media, and had already suffered damage to its reputation to add its name to a long list of civil cases, ultimately to receive a judgment against a judgment proof individual. That is absolutely no deterrent, absolutely no remedy.

The CHAIRMAN. Mr. Green?

Mr. GREEN. I cannot add anything to what Mr. Kusher said. He is exactly right.

The CHAIRMAN. Mr. Grafman?

Mr. GRAFMAN. I support Mr. Kushner's approach on that.

PENALTIES

The CHAIRMAN. The Justice Department has proposed a different penalty structure in its bill.

Is it an improvement over S. 216?

Mr. GRAFMAN. I think—let me start out by saying that——

The CHAIRMAN. Are you familiar now with the penalties in both bills?

Mr. GRAFMAN. Generally, as I understand it, in particular, they have, in the way of fines, their fines tend to be steeper, and in some situations their punishment provisions tend to be steeper.

I think that either approach would be adequate; both provide sentencing discretion to a judge who would be called upon to sentence and to mete out the appropriate punishment, up to life imprisonment in certain instances.

To the extent that some of the Justice Department proposals may provide for even more severe punishment, I do not know that we would oppose that. I would say that I think that the provisions of both bills, I believe, are basically adequate to deal with the problem.

The CHAIRMAN. Any comment from any others?

Mr. KUSHNER. I would agree with Mr. Grafman.

Mr. GREEN. We have not had a chance to study the Justice Department's suggestions, but I would agree certainly that we think that the provisions in S. 216 are ample to do the job.

FALSE CLAIMS

The CHAIRMAN. Last year we had some trouble convincing some Congressmen and Senators that hoax coverage was desirable. I would like to pin this down.

Do you all agree that hoax provisions are important and fundamental to this legislation?

Mr. GRAFMAN. Absolutely, Mr. Chairman. The damage can be done as much by the hoax situation as by the actual incident. It is true that a hoax may not cause a death, but the hoax can cause a tremendous lack of confidence by the entire consuming public.

The fear that gripped this country last fall, and caused cancellation of Halloween observances and the like, simply must be dealt with. The hijacking statute with which we are all familiar deals with the hoax type of situation, and deals with it successfully through Federal criminal law. We think that just as bombs on planes, and threats about hijackings simply are not a joking matter, the same should be true when we are dealing with consumer confidence in the products that are manufactured and sold throughout the country. In the day and age that we live in, this is simply a matter that we can no longer afford to treat as a joking matter. We wholeheartedly support it, and indeed, feel that any legislation that were passed that did not include hoax coverage would simply be inadequate.

The CHAIRMAN. Any comments by others?

Mr. KUSHNER. The hoax provision is absolutely central to this proposed legislation, for all the reasons that Mr. Grafman has identified. The country has witnessed far too many incidents that were hoaxes, that created fear throughout the country, that created a lack of consumer confidence in the safety of the products they purchases, and created a great deal of expense on the part of manufacturers, and all of those who are involved in the food distribution chain including the consumer.

The CHAIRMAN. Mr. Green?

Mr. GREEN. Just let me add that we think that the hoax provision is essential, because hoaxes really, in a fundamental way, go to the integrity of our food distribution system, and these hoaxes have a drastic impact on consumer confidence. It is absolutely fundamental to any tampering bill that does get enacted.

The CHAIRMAN. I want to thank you gentlemen for your appearance here today, and the fine contribution you made to the record.

We will hold the record open until Tuesday of next week to give other interested parties who desire to submit statements an opportunity to do so.

I believe that completes the hearing. I wish to thank all of you for your appearance here.

We now stand adjourned.

[Whereupon, at 11:27 a.m., the committee was adjourned.].

APPENDIX

**Consumer Federation of America**

March 7, 1983

The Honorable Strom Thurmond
209 Russell Building
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

The Consumer Federation of America believes it imperative that the Senate speedily enact legislation making the tampering of consumer products a felony. Particularly since the recent cyanide poisonings, consumers want the protection and assurance a tough anti-tampering law would provide.

Such legislation should cover a broad range of consumer products -- food and cosmetics as well as drugs -- providing stiff penalties for violators. It should also proscribe malicious attempts to communicate false information about the safety of particular products since these communications may not only frighten consumers, but also cause retailers to destroy stock, imposing costs that may be passed on to consumers.

We appreciate the concern you have shown for this problem and urge your advocacy of a comprehensive solution.

Sincerely yours,

Stephen Brobeck
Executive Director

SB/lag

cc: Debby Owen

1314 14th Street, N.W. • Washington, D.C. 20005 • (202) 387-6121

THE PROPRIETARY ASSOCIATION

1700 Pennsylvania Avenue, N.W./Washington, D.C. 20006/Phone (202) 393-1700

March 8, 1983

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Proprietary Association (PA), the 102-year old trade association representing manufacturers of nonprescription, i.e., over-the-counter (OTC) medicines, is pleased to submit to the Committee this letter in support of S. 216 — The Federal Anti-Tampering Act.

S. 216 would amend Title 18 of the United States Code to make it a federal criminal offense to adulterate food, drugs, devices, or cosmetics or to tamper with any article produced or distributed for consumption, both with the intent to harm people or businesses. The bill would also make it a violation to willfully or maliciously convey false information about such matters. The bill would impose severe criminal penalties for violation, the severity of the penalty depending in part upon whether people are harmed as a result of the offense.

The Association supports the concept of the Federal Anti-Tampering Act as a useful method to combat this new and malicious form of criminal conduct. This new criminal conduct, of course, was dramatically illustrated by the deliberate poisoning and resulting death of eight people in the Chicago area last October. Such criminal action threatens the well being of consumers and their peace of mind in purchasing food, drugs, devices, and cosmetics and other consumer products.

Passage of this legislation would clarify and solidify the authority of the Federal Bureau of Investigation to enter investigations of tampering, thereby assuring the availability on a nationwide basis of trained federal personnel and technical resources to act in concert with state and local officials in the detection of crimes and in the apprehension of criminals. The bill would supplement, not replace, state and local enforcement activity.

The Proprietary Association takes particular note of two important provisions of S. 216 — the "business reputation" and "hoax" sections. The "business reputation" feature makes it a violation of the Act to adulterate or tamper with covered products with the intent to harm the business reputation of an individual, partnership, corporation, association, or other business entity. The provision would help to deter the type of criminal conduct by those who might benefit in some perverse way from injury to a business reputation. The "hoax" section would make it a violation of the Act to willfully or maliciously convey false information concerning such adulteration or tampering. This section of the bill would help deter individuals from making false claims against manufacturers aimed at obtaining "windfall" settlements of such claims.

The Proprietary Association is pleased to join in the effort to enact the Federal Anti-Tampering Act because it is in the public interest. We welcome the opportunity to submit this letter in support of the legislation and appreciate the Committee's willingness to consider our views.

Sincerely,

James D. Cope
President

*Executive Offices*

MILK INDUSTRY FOUNDATION • INTERNATIONAL ASSOCIATION OF ICE CREAM MFRS.

March 8, 1983

Strom Thurmond
Chairman, Committee on Judiciary
U.S. Senate
Washington, DC 20510

Dear Senator Thurmond:

The Milk Industry Foundation and the International Association of Ice Cream Manufacturers strongly support enactment of a Federal anti-tampering act. We commend the Committee for making this legislation a top priority item for this Congress and for considering it at this time.

The Milk Industry Foundation is a trade association representing 350 processors and distributors of fluid milk and fluid milk products throughout the United States. The member companies of the Association operate 800 plants, and process about 75% of the total fluid milk processed, bottled and consumed in the United States.

The International Association of Ice Cream Manufacturers is a completely separate and autonomous organization representing ice cream manufacturers. Its 250 member companies operate 600 plants which manufacture about 80% of the total ice cream and related products consumed in the United States.

The wide variety of products manufactured and processed by member companies are handled by practically every person on a daily basis. Milk and milk products need the assurance that they have not been tampered with prior to purchase. The industry has maintained an envious record toward this end.

Even though the industry takes many precautionary steps during processing to ensure a safe and wholesome product, there is still a threat that tampering can take place. There have been many incidences, since the cyanide poisonings last fall, whereby threats have been made that milk and milk products have been tampered with. These are very damaging to consumer confidence, business reputation, and costly to investigate and take corrective action. The legislation under consideraton will go far to remove that threat and maintain the confidence of the consumer that the product is safe.

Rather than repeat some of the areas that we believe must be included as well as those which have been singled out for further clarification, MIF and IAICM endorse the statement of the National Food Processors Association which was submitted for the record on S.216. This statement is a very thorough analysis of the points which should be included in a Federal anti-tampering act. The points made and the changes incorporated makes S.216 a very good bill which will enable Congress to pass it before another life threatening incident takes place.

If we can provide any specific information, please do not hesitate to contact us.

Again, we strongly urge the enactment of this legislation.

Sincerely,

Austin T. Rhoads

Austin T. Rhoads
Vice President
Legislative Affairs

AMERICAN FROZEN FOOD INSTITUTE • 1700 OLD MEADOW ROAD, SUITE 100 • McLEAN, VIRGINIA 22102

(703) 821-0770

March 4, 1983

Chairman
EDWARD TOHN
Comstock Foods, Div. of
Curtice Burns, Inc.
Rochester, New York

Vice Chairmen
PAUL I. GORDUBY
Ore-Ida Foods, Inc.
Boise, Idaho
CHARLES RIZZUTO
Southland Frozen Foods, Inc.
Great Neck, New York

Immediate Past Chairman
JOHN ELMINI
Patterson Frozen Foods, Inc.
Patterson, California

President
THOMAS B. HOUSE
McLean, Virginia

General Counsel
COLLIER, SHANNON, RILL & SCOTT
Washington, D.C.

Directors
HERB BAUM
Naturipe Berry Growers
Watsonville, California
ORESTE J. BOSCIA
Kitchens of Sara Lee
Deerfield, Illinois
EDWARD H. COALE
Reach-Bake, Inc.
Grand Rapids, Michigan
JAMES E. CONRAD
J. R. Simplot Company
Caldwell, Idaho
GERALD V. DiCROCE
Stouffer Foods Corporation
Solon, Ohio
EDWARD R. FENCL
General Foods Corporation
White Plains, New York
R. P. GARBERG
Shuksan Frozen Foods, Inc.
Lynden, Washington
E. GLEN GRADER
Oxnard Frozen Foods Coop.
Oxnard, California
WALTER A. HAGEN
Dirkes Foods Division
SCM Corporation
Cleveland, Ohio
JACQUES LARIVIERE
Orchard Hill Farms, Inc.
Red Hook, New York
KENT C. LARSON
The Pillsbury Company
Minneapolis, Minnesota
ROBERT W. LAUFFENBURGER
Del Monte Frozen Foods, Inc.
San Francisco, California
PAUL E. MEAD
Stilwell Foods, Inc.
Stilwell, Oklahoma
MICHAEL MIDLER
Bernan Foods, Inc.
Newark, New Jersey
GLEN R. MITCHELL
Carnation Company
Los Angeles, California
ROBERT L. NICHOLS
Mrs. Smith's Frozen Foods Co.
Pottstown, Pennsylvania
CLINTON E. OWENS
The Coca-Cola Co. Foods Div.
Houston, Texas
JOHN B. PHILLIPS
ConAgra Prepared Food Companies
Omaha, Nebraska
STEVEN H. POKRESS
Van de Kamp's Frozen Foods
Long Beach, California
NORMAN A. RODRIGUEZ
United Foods, Inc.
Bells, Tennessee
ROGER M. SEABROOK
McCarty-Seale Pride Foods, Inc.
Jackson, Mississippi
LEWIS W. SPRINGER
Campbell Soup Company
Camden, New Jersey
ROBERT THOMPSON
The Dalles Cherry Growers
The Dalles, Oregon
JACK YOUNG
The Quaker Oats Company
Chicago, Illinois

Honorable Strom Thurmond
Committee on the Judiciary
U. S. Senate
2226 Dirksen Building
Washington, D. C. 20510

Dear Senator Thurmond:

The American Frozen Food Institute (AFFI) wishes to commend you and the members of the Committee on the Judiciary for conducting hearings on legislation that would create federal jurisdiction over criminal acts of tampering with foods, drugs, devices and cosmetics. We ask that you include these comments in the hearing record of those proceedings.

AFFI is the national trade association representing frozen food manufacturers and processors. Our member companies account for over 80 percent of the total yearly production of frozen food in the United States valued at approximately 26 billion dollars.

All Americans became alarmed last year when the tampering of Tylenol capsules caused the death and injury of several people. This incident led to cases of "copycat" tampering of other foods, drugs and cosmetics. With the report of each new case, consumers became more and more concerned about the products they purchased.

The tampering of products has seriously undermined public confidence in the safety of consumer items and has led to legitimate consumer concerns about the products they purchase.

AFFI strongly supports legislation that would severely punish those who tamper with consumer products and that would deter potential tamperers with harsh criminal penalties.

We urge your Committee to mark up and report legislation that makes the knowing tampering of foods, drugs, devices and cosmetics a felony when the intent is to cause

death or bodily injury. This legislation should apply to foods, drugs, cosmetics or other articles produced or distributed for consumption by individuals for purposes of personal care or in the performance of services rendered within the household.

Current law does not sufficiently deal with certain cases involving or affecting interstate commerce. AFFI feels that anti-tampering legislation should apply to those products when introduced for interstate commerce, while in interstate commerce or while held for sale after shipment in interstate commerce.

In any such legislation that is considered by the Committee, we urge you to define three new felonies in the area of tampering. These should include the tampering or attempted tampering with hazardous substances or personal use products with the intent to harm people or businesses; the adulteration or attempted adulteration of foods, drugs, devices or cosmetics with the intent to harm people or businesses; and, the willful or malicious conveying of false information about adulteration or tampering.

Any bill should discourage false threats relating to tampering. Such threats can create fear and panic in consumers. We feel a provision should be included to make it a federal offense to convey false information concerning an alleged attempt to commit a tampering offense, done with willful and malicious intent and with the knowledge that the information is false.

We strongly urge the Committee to impose severe criminal penalties to those who tamper including a possible life sentence in prison if someone is hurt or dies as a result of any of these crimes.

Mr. Chairman, AFFI feels that strong deterrents and penalties need to be imposed on individuals that intentionally threaten or harm the health and safety of consumers. Innocent Americans have every right to feel safe and secure from injury and death gratuitously inflicted by cold blooded criminals. The full force of the law and the investigative resources of the federal government must be brought to bear on this unjustifiable conduct and its aftermath.

We thank you for your consideration of these comments. AFFI would be pleased to answer any questions or discuss any comments you or your staff may have on this issue.

Sincerely,

Thomas B. House

Thomas B. House
President

TBH:krg

NFPA National Food Processors Association
1133 Twentieth Street N.W., Washington, D.C. 20036
Telephone 202/331-5900

Legislative Affairs Division
Richard W. Murphy
Vice President/Director
202/331-5939

Statement of the
National Food Processors Association

The National Food Processors Association (NFPA) appreciates this opportunity to submit a statement in support of the enactment of a federal anti-tampering act. NFPA is a scientifically and technically based trade association that represents about 600 member companies that pack processed-prepared fruits, vegetables, meats, fish and specialty products, including canned, frozen, dehydrated, pickled and other preserved food items. The Association has represented its food processing member companies on a broad range of food regulatory matters since its founding as the National Canners Association in 1907. This 75-year commitment to wholesomeness, sanitation and safety has given rise to research programs, recommended industry practices, voluntary industry programs, and support for legislation and regulations designed to assure the safety and integrity of processed foods. The cornerstones of these activities have been the research and technical work of NFPA's three laboratories, the expertise of the scientific staff of the Association, and the commitment of more than 600 member companies to the production of a safe and wholesome food supply.

The Need for Federal Anti-Tampering Legislation

NFPA is in full agreement with the sponsors of S. 216 as to the need for prompt enactment of effective federal anti-tampering legislation. Although at first look tampering with a consumer product in a retail store may appear to be an isolated occurrence of purely local concern, the fact is that the problems created are frequently national in scope and call for an effective national response.

Experience within the last six months has demonstrated that an incident involving the single act of an individual in tampering with a food or other consumer product can be expected to receive statewide and even national attention from the print and electronic media. An extremely unfortunate effect of this widespread and dramatic coverage is that venal or unbalanced individuals may be encouraged to make their own attempts at achieving national notoriety, at public expense. In short, an isolated tampering incident in a small town may be no more purely local in nature than the belated discovery of a single case of smallpox at a U.S. port of entry. The potential spread of the danger may have truly national consequences calling for national solutions.

A second important basis for federal action in this area is that virtually all packaged foods and other consumer products move across the country in interstate commerce. Tampering incidents threaten disruption of that commerce, undermine the confidence of consumers throughout the nation in what they buy, add substantially to the cost of those products, and restrict their availability to consumers. These effects on the stream of interstate commerce have unfortunately been demonstrated a number of times in recent months. This is precisely the type of interstate commerce issue to which Congress has responded in the past by enacting federal legislation to deal with national problems.

A third basis for enactment of a federal anti-tampering law is that the discovery of a poisoned or otherwise dangerously defective consumer product is not typically accompanied by an immediate determination of the cause. A prompt and thorough investigation must be undertaken which focuses on all feasible sources of the contamination, such as accidental adulteration of the product in its manufacture,

employee sabotage at the time of manufacture, mishandling of the product in transit, or tampering with the product while it is held for retail sale. Federal authorities should be in a position immediately to undertake a thorough investigation of all possible sources of the defect, and then to follow through with appropriate enforcement action once the investigation isolates the likely cause. It is unduly wasteful for federal officials to have to turn over an investigation to local authorities once it is established that the cause of the contamination may have been purely local in nature.

Finally, it should be emphasized that the Federal Food, Drug and Cosmetic Act (FD&C Act) currently has only limited application to tampering incidents, and falls far short of the statutory authority that is needed to deal with the problems that have arisen in recent months. One fundamental limitation of that Act is of course that it does not encompass all consumer products. There is a broad range of consumer products susceptible to tampering which are not subject to regulation under that Act. An even more serious limitation of the FD&C Act in this regard is that its penalties are not really addressed to deliberate acts which are committed with the intent to cause harm. Clearly a separate federal criminal law is needed that is addressed specifically to such acts and that supplements state laws in deterring the venal or irrational tampering incidents on which so much national attention has focused during the last half year.

## Basic Principles of Federal Anti-Tampering Legislation

Before addressing the specific provisions of S. 216 we would like to suggest what we regard to be the basic principles that should guide Congress.

First, a federal anti-tampering bill should effectively deal with the types of incidents that have occurred and are likely to occur. The bill should be drafted in such a way as to serve as an effective deterrent to those who may be tempted to tamper with consumer products. It should have no obvious loopholes or gaps which might be spotted by a clever mind and exploited in such a fashion as to avoid federal investigation and prosecution. Inadequate coverage of the bill might have the effect of not reducing tampering incidents at all, but merely of shifting the incidents to products or circumstances that are not covered by the bill.

Second, a federal anti-tampering bill should not deliberately overreach by attempting to deal with truly local incidents that are more effectively handled under state and local law. The temptation should be avoided to draft the bill in such broad terms that it injects the federal government into local criminal matters that have little or no relationship to the issues raised by the tampering incidents which gave rise to the need for legislation.

Third, the bill should be carefully drafted so as to avoid any constitutional or practical difficulties that might result from unintended overreaching, uncertainty of scope and application, and undue ambiguity. Care should be taken so that the bill does not arguably apply to innocent or innocuous behavior.

Finally, the bill should, wherever possible, employ terms with understood and accepted meanings derived from other statutes or case law. The employment of new terms and new concepts may well have a place in some areas of federal legislation, but they are entirely inappropriate for use in a law which must be clear, readily understood, and not subject to serious constitutional challenge.

The Specific Provisions of a
Federal Anti-Tampering Law

Intent to Injure or Kill. S. 216 would make it a federal crime for a person to tamper with or adulterate a consumer product with intent to injure or kill an individual.*/ The definition of the basic offense in terms of intent has two extremely important corollaries: actual injury is not an element of the crime, and careless or inadvertent acts are not covered.

An anti-tampering bill which applied only to incidents in which the intended injury actually occurred would perhaps be of some limited usefulness, but it would fall far short of addressing the full range of incidents which have created so much concern in recent months. A defendant whose deliberate act of tampering has endangered and terrorized an entire community or incited others to engage in copycat crimes should not be permitted to avoid conviction on the ground that the intentionally poisoned food or defective product was discovered before it was consumed. Whether injury actually results from tampering may appropriately be taken into account in the consideration of the penalties to be imposed, but should not be relevant in determining whether a crime has occurred.

There are a number of federal and state statutes which proscribe certain dangerous acts regardless of whether they actually produce the intended harm. Perhaps the most relevant and earliest examples of such statutes are the laws adopted in a number of states in the late nineteenth and early twentieth centuries which made it a crime to mingle

---

*/ H.R. 1337 (which is identical to the bill passed in the last Congress and vetoed by the President) would make the causing of death or injury a necessary element of the crime, but would perhaps achieve the same effect as S. 216 by also making unlawful "attempts to do so." Because of the ambiguity of this reference, and the complexities and uncertainties which inhere in the law of criminal attempts, we believe that the approach of S. 216 in this regard is far preferable. See the discussion of attempts below.

poison with any food, drink or medicine, with intent to injure. Typical of these is section 347 of the California Penal Code, which provides:

> "Every person who willfully mingles any harmful substance with any food, drink, or medicine, with intent that the same shall be taken by any human being to his injury, and every person who willfully poisons any spring, well, or reservoir of water, is punishable by imprisonment in the State prison for two, three or four years."

Similar prohibitions were enacted in a number of states, including Texas, Massachusetts, Michigan, and Oklahoma. These laws were frequently likened to, but distinguished from, attempted homicide. The cases interpreting these laws typically involved situations in which the defendant intended to injure or kill an individual, but in none of them was a violation deemed to be dependent upon the actual occurrence of the intended injury.*/

There are a number of federal statutes which make commission of a particular act with the requisite intent a crime, whether or not the intended injury actually results. One of these is 18 U.S.C. § 1716, which makes it a felony for a person willfully to mail a package with the specific intent of killing or injuring another or damaging the mails

---

*/ Cases involving the application of these state poisoning laws include Commonwealth v. Kennedy, 48 N.E. 770, 170 Mass. 18 (1897) (one count for mingling poison with food with intent to kill, and a second count for attempted murder by poisoning); Runnels v. State, 77 S.W. 458, 45 Tex. Cr. R. 446 (1903) (defendant charged with mingling strychnine in a tub of simple syrup with intent to kill or injure persons unknown); State v. Clark, 52 So. 691, 97 Miss. 806 (1910) (the crime consisted of mingling of poison with food, and it need not be proved that the person for whom it was intended was about to or intended to eat the food); Harkey v. State, 234 S.W. 221, 90 Tex. Cr. R. 212 (1921) (violation consisted of mingling of strychnine with coffee grounds, although the poison was discovered before the coffee was consumed); People v. Mitchell, 298 N.W. 495, 298 Mich. 172 (1941); Minter v. State, 129 P.2d 210 (Okla. 1942); People v. Mattison, 481 P.2d 193, 93 Cal. Rptr. 185 (1971).

or property.*/ Under other federal laws it is a felony to tamper with or place an explosive in a motor vehicle engaged in interstate commerce with intent to endanger the safety of persons on board,**/ to place an explosive substance in an airplane with intent to damage or destroy it,***/ and to place explosives on any vessel of the United States with intent to endanger the safety of the vessel, her cargo, or persons on board.****/

These federal statutes and the proposed anti-tampering act have several significant characteristics in common. In each, the nature of the act in question is such that: the safety of one or more persons is seriously threatened; the potential victims are particularly vulnerable and usually incapable of protecting themselves against the hidden cause; the person committing the act is or may be far from the scene when the intended injury is likely to occur; prevention of the crime and detection of the responsible person are unusually difficult, particularly since some or all of the victims may have no relation to the person committing the act; and if the intended harm does not actually occur it is only because of fortuitous circumstances beyond the control of the perpetrator.

For these reasons, Congress has chosen to define each of these federal crimes in terms of intent to inflict harm together with a deliberate, overt act which in fact threatens harm. Actual occurrence of the harm is not, and should not be, an element of the crime.

---

*/ In United States v. Wisdom, 534 F.2d 1306 (8th Cir. 1976), the court upheld a conviction under this provision against the defendant's contention that the bomb which he had mailed was only a hoax bomb which did not and could not have injured the person to whom it was mailed.

**/ 18 U.S.C. § 33.

***/ 18 U.S.C. § 32.

****/ 18 U.S.C. § 2275.

A second corollary of defining the crime in terms of intent is that the statute will not be applicable to innocent, inadvertent, or negligent acts, or to activities of manufacturers, processors, handlers and retailers which are cognizable under the Federal Food, Drug and Cosmetic Act. In order to prove a violation the prosecution will have to demonstrate that the defendant had the intent to injure or kill. The requisite intent may be proved in a number of ways, including by circumstantial evidence. In a typical tampering occurrence where a poison is deliberately added to a food product, the jury would have a basis for finding the necessary intent if it concluded that the defendant knew or had reason to know that the normal and usual consequences of his deliberate act of tampering would be to cause such injury or death.*/ On the other hand, a purely accidental occurrence in the manufacturing plant, in transit, or in the store would not be covered, nor would such relatively innocent acts as handling produce, opening an unsealed container to inspect the product, or accidentally mishandling a product in the store.

Intent to Damage the Business or Reputation of a Business Entity. S. 216 would apply to tampering with intent to cause damage or injury to the business reputation of a business entity. The principal House bill (H.R. 1337)

---

*/ There are countless cases that support the statement in the text. An early and notorious example is People v. Molineux, 168 N.Y. 264, 61 N.E. 286, 296 (1901), in which the defendant was charged with murder in the first degree for sending in the mail a gift bottle with a Bromo Seltzer label and containing Bromo Seltzer and cyanide of mercury, which was taken and resulted in the death of a person in the house to which the package had been sent. On the question of intent the court commented: "Could such a foul and cunningly devised act have been innocently done? . . . If intent may not be inferred from such an act as this, then there is no such thing as inference of intent from the character of the act."

does not include such a provision; it applies only if the prosecution has proved that the defendant intended to cause death or bodily injury.

In our view it is absolutely essential that injury to business be included. A person in a retail store, or a disgruntled employee, might tamper with a food in such a way as to make it obviously unfit for use, or in such way as to assure discovery of the defect prior to use. Or a person might add a poison to a food and then take steps, or claim to have taken steps, to warn against its use. Such actions could result in the costly destruction of large volumes of valuable consumer product, undermine consumers' confidence in a particular product or retail outlet, or encourage tampering by others.

For these reasons, the statute should apply to tampering which may be expected to damage business or business reputation even though the defendant might be able to demonstrate that injury to persons was not intended or could not be expected to result. The federal statutes prohibiting tampering with vehicles, vessels and airplanes apply if there is a showing of intent to damage the vehicles, whether or not an intent to injure passengers is demonstrated. Similarly, federal law prohibits the mailing of explosives with intent of killing or injuring another person, or of damaging the mails or property (18 U.S.C. § 1716(a)). A federal anti-tampering law should not, in our view, stop short of prohibiting the various kinds of tampering that have been shown in recent months to inflict deliberate economic harm on those who produce and sell consumer products.

"Tampering." S. 216 applies to a person who "tampers with" a consumer product, but does not define that term. In our view no statutory definition is needed. The word "tamper" is used in other federal and state statutes, and courts have upheld such statutes against charges that

they were unconstitutionally vague, holding that tamper "is a word of common usage and general understanding," and typically relying upon such dictionary definitions as that in Black's Fourth Edition, which defines it as "meddling so as to alter a thing, especially to make corrupting or perverting changes."*/

The Senate bill would make unlawful the doing of any act which results in a food, drug, device or cosmetic being adulterated with the requisite intent to injure. It uses the term "tamper" only with respect to hazardous substances and other consumer products. We believe that the concept of tampering should also be used for foods, drugs, devices and cosmetics, so as to assure the application of the act only to the type of activity which is intended to be covered. The inclusion of the concept of tampering will assure that the act would apply to deliberate "meddling so as to alter a thing," and not to innocent, innocuous or unintended acts. In addition, it seems desirable to require that there actually be a harmful change in the product, and accordingly to provide that the tampering must thereby result in the adulteration of the food, drug, device or cosmetic. The concept of adulteration is well defined in the FD&C Act and should be incorporated by reference.

The concept of adulteration has no applicability to consumer products which are not regulated under the FD&C Act, and it is thus not appropriate to refer to the adulteration of such other products. Accordingly, the bill should be drafted to apply to one who tampers with and thereby

---

*/ Some of the cases which have interpreted and applied criminal statutes involving tampering include Missouri v. Ridinger, 266 S.W.2d 626 (1954); State v. Hauston, 565 S.W.2d 773 (1978); People v. Anderson, 543 P.2d 603 (Cal. 1975); People v. Exxon, 354 N.E.2d 581 (Ill. 1976) (stating that no cases had been found holding tampering statutes to be unconstitutionally vague); In re R.F.H., 354 A.2d 844 (D.C. App. 1976) (citing Black's); Giugni v. United States, 127 F.2d 786 (1st Cir. 1942) (holding constitutional the federal statute prohibitng tampering with vessels).

significantly alters any other consumer product. As indicated in the definition from Black's quoted above, the concept of alteration is generally included within tampering, but it seems advisable to assure that the statute should be applied only to acts which result in some change in the product in question.

Attempts. S. 216 applies to "attempts to tamper" as well as to actual tampering. The principal House bill (H.R. 1337) applies to attempts, but does so in such a way as potentially to create a substantial amount of confusion as to what would constitute an attempt under the bill.*/ On balance, we believe it is advisable not to make the federal law applicable to attempts to tamper.

As we have suggested above, an anti-tampering criminal prohibition should not require that the intended harmful result actually occur -- commission of the act of tampering together with the requisite intent should constitute the crime. The basic offense is thus in the nature of an attempt, and it seems inappropriate and perhaps unnecessary to make unlawful an attempt to tamper, particularly since the law of criminal attempts is one of the most confused and

---

*/ H.R. 1337 provides in relevant part that whoever, with intent to cause death or injury, knowingly tampers with a consumer product "and thereby causes the death of or bodily injury to any individual, or attempts to do so, shall be punished" as provided in subsection (b) of the bill. This bill thus defines the basic crime as including the act of tampering, the requisite intent, and the occurrence of death or bodily injury. It is not clear how the "attempts to do so" language is meant to apply or would be interpreted by the courts. The cases dealing with the law of criminal attempts yield varying results within and among different jurisdictions. It is thus impossible to predict what acts and events would have to be proved before a person could be convicted of attempted tampering under this bill.

uncertain areas of criminal law.*/ Conceivably a customer's innocent handling of a product in the supermarket or merely opening an unsealed container might be misconstrued as an attempt to tamper. Accordingly, we propose that the bill should not include any attempts language.

Consumer Products. S. 216 applies to three categories of commodities: (1) foods, drugs, devices and cosmetics as defined in the FD&C Act; (2) hazardous substances as defined in the Federal Hazardous Substances Act; and (3) other products which are produced for consumption or use by individuals for purposes of personal care or in the performance of services rendered within the household.

If a federal anti-tampering act is to be truly effective it should apply not only to foods, drugs, devices and cosmetics, but also to other consumer products which lend themselves to tampering with intent to injure. Many commonplace household care and cleaning products could conceivably be tampered with in such a way as to present the possibility of injury. If the premise is correct that there is a sufficient threat of tampering as to justify enactment of a federal law, then it could be a serious mistake to enact and publicize such a law which applies to some but not all consumer products. A venal or irrational person intent on achieving or threatening injury might decide to avoid the risk of federal investigation and prosecution by tampering with a consumer commodity not covered by the federal law. It is the nature of the activity, not the particular consumer product, which creates the danger.

---

*/ The court's opinion in United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), contains an excellent discussion of many of the authorities and cases addressing the question of what constitutes a criminal attempt. The opinion notes that "[t]he courts in many jurisdictions have tried to elaborate on the distinction between mere preparation and attempt," and in a footnote refers to six different formulations which have been adopted or suggested as a basis for determining whether a criminal attempt has occurred. 499 F.2d at 373 n.5.

The scope of S. 216 would appear to be adequate in this regard, except that it seems unnecessary to refer specifically to hazardous substances. Any hazardous substance would be encompassed within the general definition of consumer product. The only reason for special reference to foods, drugs, devices and cosmetics is to take advantage of the adulteration concept. No such need is presented with respect to hazardous substances.

Relationship to Interstate Commerce. S. 216 applies to tampering which occurs before the product is introduced or delivered for introduction into interstate commerce, while the product is in interstate commerce, or while it is held for sale after shipment in interstate commerce. These concepts are taken directly from language in the FD&C Act which has been subject to extensive agency and judicial application and interpretation. They would ensure that tampering which takes place in the processing plant, during shipment or in the store will be covered. The bill goes further, however, and would also apply to an act of tampering which "otherwise affects interstate commerce." The intent or effect of this latter language is by no means clear.

The bill that passed Congress last year and was vetoed by the President (H.R. 1337 in this Congress) was far broader in scope, in that it applied to one who "tampers with any food, drug, device or cosmetic which at any time affects interstate commerce or foreign commerce." The meaning and effect of this language is by no means clear, since the term "affects interstate commerce" is customarily used in federal statutes to refer to an activity or an enterprise rather than to an object. If, as appears likely, an article is deemed to "affect" interstate commerce if it is ever transported across state lines, then H.R. 1337 would make it a federal crime for a person to add poison to a

food, drug or cosmetic with intent to cause death or injury. As the President noted in his message vetoing this same version of the bill passed by Congress last December, the bill "was drafted to include tampering that occurs in an injured consumer's own home."

Clearly it seems unnecessary and inappropriate to expand federal jurisdiction to this extent. Poisoning which occurs in a purely private context in a home should remain subject to state homicide and poisoning statutes. There is no reasonable basis for federal involvement in such crimes, which do not have the same potential for national impact as a tampering incident occurring in a retail store. In addition, it seems unwise to create substantial constitutional questions by seeking to make federal criminal law applicable to purely private activity in the home solely on the ground that the product employed at one time traveled in interstate commerce.

S. 216's application to tampering which "otherwise affects interstate commerce" might not be interpreted as broadly as the language in H.R. 1337, but it is nevertheless subject to similar objection on the grounds of its ambiguity and potential breadth. Accordingly, we propose that the bill be drafted to include the interstate commerce references currently contained in the FD&C Act. These should be sufficiently broad to encompass any tampering which is appropriately cognizable under federal criminal law.

False Reports of Tampering. S. 216 would make criminal the willful and malicious imparting of false information concerning an attempt or alleged attempt to do any act which would constitute a violation of the anti-tampering provision, if death or personal injury results to another, or if such conduct causes any person to be in sustained fear for his safety, or causes any government agency or company to prohibit the sale or recall of a

product. H.R. 1337 does not include a false information provision.

We strongly support inclusion of a false information provision in this legislation, but sufficiently restricted to assure that it could not be applied to frivolous claims or to casual or unthinking statements that have little or no potential to cause damage, disruption or injury. To that end we propose several modifications of the false information provisions of S. 216. First, it does not seem appropriate or necessary to include the "attempt or alleged attempt" language, apparently taken from the federal bomb hoax provision found at 18 U.S.C. § 35, since it is not a false report of an attempt at tampering which creates concern but a false report that a product has actually been tampered with. Accordingly, the bill should be restricted to the imparting of false information, knowing it to be false, that a consumer product held for sale has been tampered with and contains a poisonous or other harmful substance.

A second proposed modification of the false report section of S. 216 would be to eliminate the reference to causing sustained fear for a person's safety. In our view that provision is unduly broad and ambiguous, and perhaps subject to prosecutorial misuse or even constitutional challenge. Two other modifications would be to provide that any recall or prohibition of sale of a product must be a "reasonable" response by the government or a company, and that any disruption to the public must be both serious and substantial.

With these revisions in the false information provision of S. 216, the concerns that some have expressed about a false reports provision may be alleviated. Such a provision has counterparts not only in the federal bomb hoax statutes but also in state laws which make it a crime to give a false report of a criminal offense. Most or all

states have provisions such as that in section 148.5 of the California Penal Code, which provides:

> "Every person who reports to any police officer, sheriff, district attorney, deputy sheriff, deputy district attorney, or member of the California highway patrol that a felony or misdemeanor has been committed, knowing such report to be false, is guilty of a misdemeanor."

There are also many more specific state statutes, such as that in section 148.1 of the California Penal Code making it a felony for any person to report falsely to any law enforcement official, employees of transportation companies, occupants of a building, or news reporters that a bomb has been placed in any private or public place. It is widely recognized that such false reports can result in substantial dislocation and cost, and conceivably cause injury if panic or overreaction results.

In the context of an anti-tampering bill, there can be no question that knowingly false reports about poison in food or drug products in retail stores have the potential for causing extreme discomfort and injury to those who take antidotes or other medical treatment because they have been led to believe that they have ingested a poison. It is even more likely that such reports would result in costly market withdrawals and recalls, investigations, product analyses, and destruction or reconditioning of the suspect products. Indeed, a false report of a tampering incident could be expected to have many or all of the same adverse effects as a real tampering incident that is discovered before anyone is actually injured by the poisoned or otherwise defective product.

Conclusion

For the reasons set forth in our statement, we urge that the Committee promptly report out an appropriate and effective federal anti-tampering bill. We have taken the liberty of attaching to this statement a marked-up version of S. 216 incorporating the modifications we have proposed in this statement.

PROPOSED REVISIONS TO S. 216
[Language omitted is interlined;
language added is underlined]

A BILL

To amend title 18, United States Code, to combat, deter, and punish individuals who adulterate or otherwise tamper with food, drug, cosmetic, and other products with intent to cause personal injury, death, or other harm.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Anti-Tampering Act".

SEC. 2. Title 18, United States Code, is amended by adding the following new chapter:

"CHAPTER 56--ADULTERATION

"§ 1211. Malicious injury by adulterating a product

"(a) Whoever, with intent to injure, kill, or endanger the health or safety of any person, or with intent to cause damage or injury to the business or business reputation of an individual, partnership, corporation, association, or other business entity (1) tampers with and thereby renders adulterated any ~~does-any-act-which-results-in-a~~ food, drug, device, or cosmetic ~~being-adulterated-or-attempts-to-do-any-such-act~~ or (2) tampers with and thereby significantly alters any other consumer product ~~or-attempts-to-tamper-with-any-hazardous-substance-or-any-other-article,-product,-or-commodity-of-any-kind-or-class-which-is-produced~~

~~or-distributed-for-consumption-by-individuals-or-use-by individuals-for-purposes-of-personal-care-or-in-the-performance of-services-rendered-within-the-household,~~ if such act of ~~adulteration-or~~ tampering occurs before the food, drug, device, cosmetic, ~~hazardous-substance~~ or other ~~article,~~ consumer product~~,-or-commodity~~ is introduced or delivered for introduction into interstate commerce, while such ~~item~~ product is in interstate commerce, or while such ~~item~~ product is held for sale (whether or not the first sale) after shipment in interstate commerce, ~~or-if-such-act-of-adulteration or-tampering-otherwise-affects-interstate-commerce,~~ shall be punished by imprisonment for not more than twenty years or fined not more than $20,000, or both, or, if personal injury or death results to another, by imprisonment for any term of years or for life.

"(b) Whoever, with willful and malicious intent, imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, ~~concerning-an-attempt-or-alleged-attempt-being-made-or-to-be made,-to-do-any-act-which-would-constitute-a~~ that a consumer product has been tampered with in violation of subsection (a) shall be punished --

"(i) if personal injury or death results to another, by imprisonment for any terms of years or for life;

"(ii) if such conduct ~~causes-any-person-to-be-in sustained-fear-for-his-or-another-person's-safety,~~ causes any government agency or authority to direct a sale prohibition against, or recall of, any food, drug, device, ~~or~~ cosmetic, or other consumer product, or causes any individual, partnership, corporation, or association to implement such prohibition or recall in reasonable response to such conduct, or causes other serious and substantial disruption to the public, by imprisonment for not more than twenty years or by a fine of not more than $20,000, or both.

"(c) As used in this section, ~~subsection (a),~~ 'food', 'drug', 'device', 'cosmetic', and 'adulterated' shall have the meanings ascribed to those terms in the Federal Food, Drug, and Cosmetic Act, as amended (21 U.S.C. 301-392); ~~'hazardous substance' shall have the meaning ascribed to that term in the Federal Hazardous Substances Act (15 U.S.C. 1261(f)),~~" and 'consumer product' shall mean any article, product or commodity of any kind or class which is produced or distributed for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services rendered within the household."

SEC. 3. If any provision of this Act is held invalid, all valid provisions that are severable shall remain in effect. If a provision of this Act is held invalid in one or more of its applications, the provision shall remain in effect in all of its valid applications that are severable.

SEC. 4. The analysis of part I of title 18, United States Code, is amended by adding the following:

"56. Adulteration ..... 1211".

PREPARED STATEMENT OF THE
FOOD MARKETING INSTITUTE

Thank you Mr. Chairman for the opportunity to appear before the Committee on the Judiciary to give the views of the Food Marketing Institute and its members on proposed Federal Anti-Tamper ng Legislation. I am George Green, Assistant General Counsel.

Food Marketing Institute (FMI) is a non-profit association that conducts programs in research, education and public affairs on behalf of its 1,200 members -- food wholesalers and retailers and their customers in the United States and overseas. FMI's domestic member companies operate over 17,000 retail food stores with a combined annual sales volume of $125 billion -- half of all grocery sales in the United States. More than three-fourths of FMI's membership is comprised of independent supermarket operators or small regional firms. Its international membership includes more than 100 members from 37 nations.

Mr. Chairman, FMI strongly supports your legislation (S. 216) making it a federal felony to tamper with consumer products. We appreciate your leadership on this important issue. The American consumer has a high degree of confidence in the quality and safety of the products they buy in our nation's super- markets. The tampering situations, with which we are all familiar, have caused concern to both consumers and distributors in maintaining that trust and confidence.

We believe that legislation is needed to provide a harsh deterrent against product tampering in order to protect customers and maintain faith in product safety.

We applaud the Committee's efforts and quick action in passing legislation in the last Congress. Namely, legislation should cover tampering, or attempts to tamper, with not only food, drugs, devices or cosmetics, but

also with other consumer products as well. There are many products for use by consumers in a grocery store which would not be covered under the definition of food, drug, device or cosmetic. For example, there are many products commonly used around the home which would not be covered. There appears to be no good reason to exempt these products from any new legislation. To do so would leave the legislation incomplete and would also give potential criminals a safe haven where they may act with relative impunity from this proposed federal jurisdiction.

Legislation should make illegal the willful or malicious conveyance of false claims that products have been subjected to tampering. Since the Chicago incident, there have been a number of "hoaxes" throughout the country. Unfortunately, there have also been many "copycat" situations which were not hoaxes. The reasons for a hoax may vary, for example:

- o it may constitute an attempt to injure a business by forcing the government or a company to issue product recalls,
- o it may occur as part of an effort to claim damages for a fake injury, or
- o a false report may be part of an extortion attempt.

False reports made in such circumstances could be clearly disruptive, could be dangerous to individual welfare, could seriously harm businesses, and should be made criminal. These claims and reports engender fear in the consumer and destroy public confidence. The result is that the consumer is "held hostage" to false claims.

This proposal regarding hoaxes finds counterparts in both the Federal Bomb Hoax Statute, 18 USC 35, and also in various state laws that make it a crime to give a false report that a criminal offense has been committed. We respectfully suggest that conveying false information is somewhat akin to crying "Fire" in a crowded theater. Perhaps there isn't an actual fire, but

the scramble and chaos caused by the false alarm can sometimes also cause injury. The second and more insidious effect of false claims is that they make it more difficult to determine when an actual tampering has taken place. The public, as well as officials dealing with the situation, may be worn down and lulled into giving less than the degree of care that they would otherwise exercise.

We believe that a federal anti-tampering statute can have the same potential in deterring anti-tampering as the anti-hijacking and bomb hoax efforts have had on hijacking and bomb hoaxes.

The federal efforts to deter hijacking have come down hard on jokers and pranksters. Tampering with consumer products is no joking matter either and any false claims or hoaxes connected with tampering or would-be tampering should also be prohibited. We believe the legislation should make criminal actions taken with intent to cause injury to businesses, as well as those taken with intent to injure individuals. Other witnesses will address or have addressed this issue and I will not cover it in detail here. We do think that this is a very important provision. The damage to public confidence and public peace of mind is no less severe because the person committing the act did not intend to injure an individual. Acts committed with the intent to injure a business but having the potential to injure, kill or endanger the health or safety of an individual should be covered by this legislation.

Finally, the legislation should provide stiff penalities for violations. We believe that the time is right for a tampering bill and that Congress should pass such legislation soon. We also believe that Congress is prepared to pass a bill strong enough and far-reaching enough to do the job demanded. We think that S. 216 includes all the necessary provisions to do the job. We urge this Committee to report the legislation to the floor as expeditiously as possible.

Thank you very much Mr. Chairman for your time and consideration. I will be pleased to answer any questions that you or the Committee may have.

NATIONAL
GROCERS
ASSOCIATION

Headquarters Office
1825 Samuel Morse Drive
Reston, Virginia 22090

Public Affairs Office
1910 K Street, N.W. Suite 700
Washington, D.C. 20006

(703) 437-5300

STATEMENT

ON

S. 216

BY

THOMAS K. ZAUCHA, PRESIDENT

NATIONAL GROCERS ASSOCIATION

Mr. Chairman and committee members, I am Thomas K. Zaucha, president of the National Grocers Association (N.G.A.). N.G.A. is dedicated to representing the nation's independent retail grocers and the distribution centers supplying them. N.G.A.'s membership presently includes 1,300 independent retail grocery firms, and 65 retailer-owned cooperatives, serving over 28,000 independent grocery stores. N.G.A. members serve every type of community including urban, rural and inner city through supermarkets, box stores, warehouse stores, convenience stores, and other types of retail food establishments.

Consumers look for food and other product supplies to be wholesome, safe, and sold at reasonable prices. Events in 1982 with over-the-counter drugs created a need for protecting the consuming public from criminal tampering or adulterating of food, drugs, devices, and cosmetics, or threats of such acts. Criminal acts by individuals to adulterate and tamper with food, drugs, devices, and cosmetics, or make false claims, have placed uncertainty on the marketplace. Death and serious physical injury have been inflicted on consumers. Financial losses have been imposed upon business in the nature of recalls, withdrawal of products from the marketplace, and damage to business goodwill. These acts of crime need to be severely and forthrightly dealt with.

The 97th Congress passed the Federal Anti-Tampering Act as part of a comprehensive legislative bill on December 16, 1982. This legislation was sent to President Reagan for his approval. However, controversial provisions of the legislation necessitated President Reagan's veto of H.R. 3963 on January 14, 1983. In vetoing H.R. 3963, the President backed "the provision that expands federal jurisdiction whenever food, drug or other products are tampered with, and expansion that I strongly support. . ." President Reagan further stated, "I share the widespread public desire for new legislation on tampering, and will work with the new Congress to produce an acceptable bill on that subject."

Congress has accepted the President's indication of support by introducing new legislation to punish individuals who willfully and intentionally tamper with, adulterate, or make false claims of tampering or adulterating food and other products with the intention of causing harm, injury or death to other persons. In the Senate, S. 216 has been introduced by Senator Strom Thurmond and 36 other Senators. In the House of Representatives,

H.R. 778 by Representative Cardiss Collins, H.R. 1337 by Representative William Hughes, and H.R. 1544 by Representative Harold Sawyer, have been introduced.

The National Grocers Association welcomes the strong and swift action members of Congress have taken in sponsoring legislation to impose federal penalties. All the legislation introduced has the meritorious objective of punishing and deterring criminal activity. N.G.A. and its members share this objective and desire that criminals be punished for the broad range of intentional criminal activity that occurs. The consuming public and the food industry need to be protected not just against intentional criminal acts or attempts of adulteration or tampering, but also against threats, hoaxes or false claims of such acts. Independent retail grocers and the distribution centers that supply them depend upon the continued commerce of goods for business success. The effect of disruption on commerce or sales, whether by adulteration or tampering, attempts, or false claims of such effects, can be equally devastating.

It is imperative that strong federal penalties be imposed upon individuals that would make false claims involving adulteration or tampering with food, drugs, devices, and cosmetics which would result in personal injury and/or death, or harm to business enterprises. Based upon the need to protect the public from these criminal acts, N.G.A. believes that S. 216 is best suited to provide comprehensive protection to the consuming public and business enterprises involved in the distribution of food, drugs, devices, and cosmetics.

S. 216 is a strong deterrent to individuals who would willfully and intentionally adulterate or tamper with food products with the intent to injure other individuals or food enterprises. Federal jurisdiction is essential in this area to protect the consuming public who depend on the interstate commerce of food, drugs, devices, and cosmetics for fulfilling their basic needs. N.G.A. believes that attempts to tamper, or to threaten these acts, are equally serious and deserving of punishment. The situation involving the commerce of food, drugs, devices, and cosmetics is very similar to the commerce of people in airplanes. The consuming public needs to be assured that threats involving food, drugs, devices, and cosmetics will be dealt with as severely as threats of airline hijackings.

The recent events involving over-the-counter drugs have brought the nation's attention to these criminal acts. Members of N.G.A. believe that it is incumbent that federal prosecution be a remedy to punish and deter these criminal acts where injury results. S. 216 makes it a criminal penalty for anyone with the intent to kill, or endanger the health or safety of any person, or with the intent to cause damage or injury to a business reputation, to tamper with food, drugs, devices, or cosmetics, or any hazardous substance or other product which is produced and distributed for consumption by individuals or in the performance of a service rendered within the household. In addition, penalties are imposed for anyone who would willfully or maliciously convey false information that results in personal injury or death or a product recall by way of a false claim of adulteration or tampering.

Penalties of up to 20 years or fines up to $20,000, or both, would be imposed by S. 216, with a possible life sentence if an individual is injured or dies as a result of the crimes. N.G.A. supports these strong criminal penalties.

The food distribution industry depends upon public goodwill and confidence in the marketing system. Threats against the food, and other product distribution systems, impose a threat to public confidence. Criminal acts of tampering, or false claims, expose consumers to physical harm; and independent retail grocers and their suppliers to financial hardship. Products have to go under recall. Removing products from distribution as a result of tampering or false claims causes loss of sales and damages business goodwill. It is vitally important that criminal penalties be imposed to deter and punish those who would tamper with food, drugs, devices, and cosmetics.

In conclusion, on behalf of independent retail grocers, the suppliers who assist them in distributing food, drugs, devices, and cosmetics to the consuming public, we encourage you to act swiftly in passing legislation that will impose criminal penalties upon those who adulterate, tamper with, or make false claims concerning tampering and adulterating food, drugs, devices and cosmetics. The American public deserves to know that those who engage in these criminal activities will be punished. Individuals who would contemplate tampering or adulterating with food, drugs, devices, and cosmetics. must be put on notice that they will face stiff penalties for these crimes. Those that would engage in threats, or hoaxes involving adulterating or tampering with food, drugs, devices, and cosmetics must be punished severely as well. These criminal activities pose substantial harm to the commerce that is so important to the American public. N.G.A., its independent retail grocers, and retailer-owned cooperatives, pledge to work with the Congress and the President in seeing that these criminal acts by individuals are punished.

Johnson & Johnson

JAMES E. BURKE
CHAIRMAN OF THE BOARD

NEW BRUNSWICK, NEW JERSEY 08903

STATEMENT BY JOHNSON & JOHNSON
for the record of the
SENATE COMMITTEE ON THE JUDICIARY
CONCERNING S.216

Johnson & Johnson is pleased to submit this statement for the record in support of S.216, the Federal Anti-Tampering Act:

Johnson & Johnson develops, manufactures and markets health care products internationally. Its business includes professional products such as surgical dressings, sutures and diagnostic equipment and reagents; pharmaceuticals for a wide range of applications; and a line of consumer products. These include first aid supplies, baby toiletries, feminine hygiene products, and over-the-counter analgesics such as the TYLENOL* line.

We commend Chairman Thurmond and the Senate Committee on the Judiciary for giving prompt attention to the issue of criminal tampering.

During the Fall of last year, seven Chicago area residents died as a result of criminal tampering with TYLENOL* Extra-Strength Capsules. It is likely that the murderer(s) removed TYLENOL* containers from retail shelves, tampered with their contents by emptying capsules and inserting cyanide, and placed the bottles back on the shelves. The Chicago incidents were followed by numerous tamperings throughout the United States which involved a range of consumer products.

The proprietary drug industry and the Food and Drug Administration immediately joined in an emergency effort to

reduce the public danger associated with acts of product tampering. The result was a new set of standards governing package security for over-the-counter drugs. While this was an important step, we are convinced it did not diminish the need for strengthening applicable criminal laws; S.216 would accomplish this objective.

The bill would provide a necessary law enforcement tool by permitting the early intervention of Federal law enforcement agencies in certain criminal tampering cases. It would enhance existing law and send a clear message to those who would contemplate heinous crimes through adulteration of everyday consumer products. Such a law would signal swift detection, prosecution and punishment to would-be criminals. It would serve as both a deterrent and, when necessary, as a mechanism to assure the prompt mobilization of Federal law enforcement resources.

While we support the bill, we are aware that there are a number of technical and practical considerations raised by this kind of legislation. The committee may need to consider, for example, whether legislation should also apply to criminal attempts, or whether products other than those covered in the bill should be included. Other experts have offered detailed and thoughtful comments on those issues.

We are convinced that the need for legislation is urgent, and at the same time, believe that Congress should regard this subject as a continuing area of concern. There may be a need to develop further legislation as product tampering problems are studied and evaluated.

Finally, we agree with the Chairman that the American consumer has a basic right to full protection against death and injury in the marketplace. The proposed legislation makes a sensible contribution to the defense of that right, and we urge that it be approved.

*Trademark

TESTIMONY
SUBMITTED BY
DENIS R. ZEGAR
VICE PRESIDENT, GOVERNMENT SERVICES
NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION

## NAWGA TESTIMONY ON ANTI-TAMPERING BILL

The National-American Wholesale Grocers' Association (NAWGA) submits this statement in support of proposed Federal Anti-Tampering legislation.

NAWGA is a national trade association representing nearly 400 independent wholesale grocers and food service distributors. These companies, both large and small, supply grocery products and provide a wide array of services to retail grocery stores, hospitals, schools, restaurants and other food service establishments throughout the United States. Marketing products from over 800 separate distribution centers, NAWGA member companies account for nearly $60 billion of the nation's grocery product volume and one-third of the grocery supplies distributed nationally.

NAWGA strongly supports Federal legislation which will provide severe criminal penalties for the deliberate contamination or attempted contamination of foods, drugs, cosmetics, and other consumer products. Such legislation is necessary to protect the American consumer, restore public confidence in product safety, and safeguard the assets and reputation of America's food manufacturers, wholesalers, and retailers.

The need for Federal legislation has been tragically demonstrated by the Tylenol incident and other "copycat" tamperings. In October 1982, seven people died as a result of taking Extra Strength Tylenol contaminated with cyanide. In the wake of that heinous crime, a wave of product tampering has occurred involving a wide variety of consumer products. In addition, the American public has been subjected to thousands of prank reports of product tampering. These hoaxes have created fear in the minds of consumers,

destroyed public confidence in product safety, and resulted in the initiation of costly product recalls. These incidents, both real and prank, have also severely damaged without cause the hard earned reputations of food and consumer product manufacturers, distributors, and retailers.

Existing Federal sanctions and penalties are inadequate to deter product tampering. The Federal Food, Drug, and Cosmetic Act is not intended to cover incidents of product tampering or deliberate contamination. Furthermore, there is no statutory penalty for willfully or maliciously conveying false information concerning a product tampering.

Although state and local homicide laws might cover tampering, prosecution of those who threaten the public safety should not be left wholly to the states. The consumer product industry is nationwide; hence, the consequences of tampering incidents transcend state boundaries. The Federal government has a responsibility in assuring the safety of the American consumer. The enactment of Federal legislation will commit the resources of the Federal Bureau of Investigation to track down and punish the guilty.

If the public's confidence is to be restored, and the American consumer is to be protected, new legislation is needed to deter future product tamperings. To effectively deter the wrongdoers, the legislation should prohibit every action which jeopardizes the well-being of consumers and businesses.

The legislation should cover every possible motive for adulteration or tampering, since the tragic consequences are the same whether or not the wrongdoer intends to harm an individual or a business. To limit the motive solely to an intent to harm an individual would allow the guilty to escape punishment by claiming his/her intent was to harm a business.

The legislation should also cover every possible article that might be adulterated or tampered, including food, drugs, cosmetics, and all other consumer products. Failure to do so might encourage tampering of consumer products not covered by the law.

Criminal penalties should be imposed for every action or attempted action that might result in harm to an individual or a business or in any way undermine public confidence in consumer product safety. Although actual adulteration or tampering of consumer products are the most obvious actions to be prohibited, the Congress should also proscribe prank reports of product tampering. Hoaxes, no less than actual tampering, undermine public confidence and harm businesses. Other witnesses have testified how a hoax can harm a company's reputation and result in the initiation of a costly product recall. Criminal sanctions for the willful or malicious conveyance of false information is not novel. It is currently a Federal crime to willfully convey false information regarding hijackings or bomb threats. Product tampering hoaxes are no less disruptive than hijacking or bomb hoaxes, and thus should also be prohibited.

Finally, the legislation should include strong sanctions for those who actually cause injury or death. These sanctions should be especially strong up to and including life imprisonment whenever an individual dies as a result of product tampering.

Product tampering tragedies have injured consumers and businesses as well as undermined public confidence in product safety. What is necessary to protect consumers and restore public confidence is strong Federal legislation to deter those who would tamper or convey false rumors of a product tampering.

○